

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting Diversification of Ownership)	MB Docket Nos. 07-294; 06-121;
In the Broadcasting Services)	02-277; 04-228
)	
)	MM Docket Nos. 01-235; 01-317;
)	00-244; FCC 07-217
To: The Commission		

**COMMENTS OF NATIVE PUBLIC MEDIA AND
THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS**

Native Public Media ("NPM") and the National Federation of Community Broadcasters ("NFCB") respectfully submit these comments in response to the Report and Order and Third Further Notice of Proposed Rulemaking ("NPRM") regarding Diversification of Ownership in the Broadcasting Services released on March 5, 2008 by the Federal Communications Commission ("FCC" or "Commission"). As associations of radio stations committed to providing local and diverse broadcasting, and in particular enhancing the voice of Native America, NPM and NFCB fully support measures to increase opportunities for new entrants and small businesses in the broadcasting sector.

I. BACKGROUND

NPM and NFCB are organizations dedicated to community broadcasting. NPM represents the interests of thirty-three Native owned public radio stations that serve Native nations as well as non-native listeners throughout the United States.¹ Since its launch in 2004,

¹ NPM, formerly known as the "Center for Native American Public Radio," was created as a center under the National Federation of Community Broadcasters with seed funding from the Corporation for Public Broadcasting. A list of the NPM member stations can be found at http://www.nativepublicmedia.org/index.php?option=com_content&task=view&id=26&Itemid=48.

NPM's primary focus has been supporting existing Native American public radio stations and promoting ownership for more Native communities by serving as an advocate, national coordinator, and resource center. Strengthening and expanding the voice of Native America is NPM's primary goal.

There are 2.5 million Native Americans in the United States and 562 Native Nations; all inherently sovereign with their own political and tribal structures. However, the disadvantaged situation of many Native nations hinders their ability to gain ownership and maintain strong broadcasting stations. First, there is little funding available for the initiation and development of Native radio on many reservations. Second, Native stations are limited in their capacity to produce quality programming due to shoestring budgets, distances radio personnel and staff must travel to get to the station, and the absence of broadcast training opportunities in tribal communities. Third, Native stations in rural areas must transmit under less than ideal circumstances. Lack of dependable electricity, uneven terrain, and the large area that must be covered in order to broadcast to even a small community create serious complications. Bringing robust communications technology to Native American lands has been a constant struggle,² but efforts by the United States government to better recognize the needs of tribal governments and their people will create more opportunities for Native broadcasting.

The NFCB is a 33-year-old grassroots organization that was established, and continues to be supported, by member stations. NFCB member stations are distinguished by their commitment to local programming, community participation, and community support. NFCB's 250 members exemplify diversity. They come from across the United States, from Alaska to

² The first tribal radio stations only began in the 1970's. *See Native Public Media Brings Native American Voices to Washington Policymakers*, Media Minutes (May 30, 2008).

Florida, from every major market to the smallest Native American reservation. While urban member stations provide alternative programming to communities that include New York, Los Angeles, San Francisco, and Chicago, rural members are often the sole source of local and national daily news and other important information in their communities. NFCB's membership reflects the true diversity of the American population: 41 percent of members serve rural communities, and 46 percent are radio services controlled by minorities.

NPM and NFCB believe that a healthy Native or local viewpoint expressed by strong, independent Native American or community broadcasting services will enhance democracy by heightening national awareness of Native culture and promoting a more diverse marketplace of ideas. Many of the rules proposed by the FCC, if adopted, would constitute a step towards acknowledging tribal sovereignty, and would promote longstanding Commission policy goals in the provision of broadcast service, including competition, localism and diversity.

II. COMMENTS REGARDING THE DEFINITION OF "ELIGIBLE ENTITY"

The Commission seeks comment on whether it can or should expand the current definition of "eligible entity," which adopts the Small Business Association ("SBA") definition of small business.³ An expanded definition should promote ownership diversity and new entry while comports with the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*.⁴ NPM and NFCB advocate a race-neutral definition of "eligible entity" that reflects the unique political relationship between the FCC and federally recognized Indian Tribes.⁵

³ Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-217, MB Docket No. 07-217, ¶ 80 (rel. March 5, 2008) (hereinafter "NPRM").

⁴ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

⁵ NPM and NFCB support a definition of "eligible entity" based on the Small Business Association's socially and economically disadvantaged business classification in which "African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Asian Americans, and (footnote continued)

In *Adarand*, the Supreme Court found that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."⁶ *Adarand* set a high bar for overcoming the strong presumption that all race-based classifications are unconstitutional. To date, no federal court has upheld a regulation utilizing racial classifications outside the context of higher education.⁷ Because a definition based on racial classifications could prove overly burdensome for the Commission, NPM and NFCB propose a definition of "eligible entity" that is void of any racial considerations.

NPM and NFCB advocate a definition of "eligible entity" that includes "Indian Tribes" and "Tribal Governments" as eligible entities. This definition advances the Commission's stated policy goals regarding Native Americans and promotes diversity by providing opportunities for communities with significantly underrepresented viewpoints. "Indian Tribes" and "Tribal Governments" should be classified as follows:

The term "Indian Tribe[s]" or "Federally-Recognized Indian Tribes" means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians.⁸

Native Americans are presumed to qualify." However, if such a definition is not adopted by the Commission, NPM and NFCB strongly recommend that the Commission adopt a definition of "eligible entity" that recognizes the political status of Native Americans and Alaskan Natives. Regardless of which definition is chosen, NPM and NFCB urge the Commission to include language within the definition of "eligible entity" that accounts for organizations owned and operated by the aforementioned minority groups, specifically Native American organizations and Tribes.

⁶ *Id.* at 224.

⁷ *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸ *See Federally Recognized Indian Tribe List Act*, 25 U.S.C. § 479(a)(2) (1994).

The term "Tribal Governments" means the recognized government of an Indian Tribe that has been determined eligible to receive services from the Department of Interior, Bureau of Indian Affairs.⁹

The distinct legal relationship that exists between the Federal government and Indian Tribal governments is reflected in the United States Constitution, treaties, federal statutes, Executive orders, and numerous court decisions.¹⁰ In its Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes ("Policy Statement"), the Commission acknowledges Indian Tribes as "domestic dependant nations, [which] exercise inherent sovereign powers over their members and territory," and states that the "federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes."¹¹ An expanded definition of "eligible entity" that includes Indian Tribes as distinct political communities is well-rooted in the political and legal history of the United States.

Further, the Commission's commitment to work with Indian Tribes to ensure "that Indian Tribes have adequate access to communications services"¹² supports a definition of "eligible entity" that acknowledges the unique position of Indian Tribes. The Commission recognizes in its Policy Statement that, despite efforts to provide telecommunications and information services

⁹ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553 (April 4, 2008).

¹⁰ Federal Communications Commission, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, 3 (hereinafter "Policy Statement"); see U.S. Const. art. I, § 8, cl. 3; see e.g., 25 U.S.C. §§ 461 *et seq.*, and *Seminole Nation v. United States*, 316 U.S. 286 (1942).

¹¹ Policy Statement, at 3.

¹² *Id.* at 4.

to all regions of the United States, "certain communities, particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all."¹³ As such, the Commission has advanced its relationships with Indian Tribes and Tribal governments through programs such as the Indian Telecommunications Initiative¹⁴ and seeks to further the goals of competition, localism, and diversity in broadcasting by incorporating "Indian policy goals into its ongoing and long-term planning and management activities."¹⁵

In its NPRM, the Commission states, "[i]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹⁶ A definition of "eligible entity" that accounts for Indian Tribes furthers this important policy goal by expanding opportunities for new Native American entrants, women and small businesses to own broadcasting outlets. It also makes it possible for Native Americans to acquire a license and attract the capital necessary to compete in the marketplace where, under current conditions, it is difficult if not impossible for Native Americans to compete against larger and better financed companies.

The expanded definition of "eligible entity" advocated by NPM and NFCB is based solely on the unique political relationship between Indian Tribes and the federal government. Therefore, it will not implicate due process concerns. Because the federal government has historically recognized the distinct position of Indian Tribes through legislation and policy

¹³ *Id.* at 1.

¹⁴ Indian Telecommunications Initiatives is a comprehensive FCC program that seeks to promote understanding, cooperation, and trust among American Indian Tribes and Alaska Native Villages, Tribal Organizations, the FCC and other government agencies, and the telecommunications industry. See <http://www.fcc.gov/indians/iti.html> for more information.

¹⁵ Policy Statement, at 5.

¹⁶ NPRM at ¶ 2 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994)).

statements and the Commission has evidenced its strong commitment to enhancing communications services for Tribal Governments, a definition of "eligible entity" that includes Indian Tribes and Tribal Governments will further the Commission's goals of promoting new entry and greater diversity among broadcast station owners.

III. COMMENTS REGARDING OPPORTUNITIES FOR ELIGIBLE ENTITIES

A. Revision of Rules Regarding Construction Permit Deadlines

As an initial matter, NPM and NFCB applaud the Commission's decision to afford eligible entities that acquire an expiring construction permit additional time to build out their facility.¹⁷ Additional time preserves the Native American public's ability to participate fully in the broadcasting licensing process, encourages the use of broadcast spectrum for underserved and underrepresented Native communities, reduces the burden on Native licensees, and acknowledges the governance systems of Native communities.

In furtherance of a policy that provides maximum benefits for small businesses and new entrants, specifically minority- and women-owned businesses, NPM and NFCB ask the Commission to consider limiting the price at which the holder of an expiring construction permit may sell the permit to an eligible entity, with the price being no greater than the actual costs of acquiring the construction permit. Such a limitation will help ensure that under-funded eligible entities, such as many Native American owned stations, have a fair chance to purchase expiring permits and construct new stations to serve their listeners.

¹⁷ NPRM at ¶ 10.

B. Distress Sale Policy

NPM and NFCB also agree that granting eligible entities the opportunity to acquire stations at a distress sale facilitates diversity in the broadcasting services,¹⁸ but caution that small Native stations could experience serious losses if the FCC raises the bar on renewals as proposed in the Localism proceeding.¹⁹ NPM and NFCB suggest that the Commission provide a safeguard so that distressed Native stations can recover over a certain period of time and/or sell the distressed station to a Native "eligible entity" to avoid the loss of a license, and hence an important voice of Native America. In order to ensure that this policy is not abused, NPM and NFCB urge the Commission to closely monitor the sales of distressed stations to eligible entities.

C. Opening FM Spectrum for New Entrants

NPM and NFCB generally agree with the Commission's decision to decline to adopt the specific proposals submitted by the Diversity and Competition Supporters ("DCS") regarding opening the FM spectrum for new entrants.²⁰ However, NPM and NFCB believe that opening the FM spectrum, with certain limitations, would create additional opportunities for new entrants and would enhance the diversity of ownership in broadcasting. Should the Commission decide to eventually open the FM spectrum to new entrants, NPM and NFCB urge the Commission to limit entities that may acquire such spectrum to new entrants and eligible entities. This policy would promote competition and increase the diversity of viewpoints on the airwaves.

¹⁸ *Id.* at ¶ 39.

¹⁹ Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218, MB Docket No. 04-233 (rel. Jan. 24, 2008).

²⁰ While NPM and NFCB agree that the Commission should not uniformly repeal the third adjacent channel requirements found in Section 73.215(a), NPM and NFCB support efforts to repeal the requirements for low power stations.

D. Duopoly Priority, Extension of Divestiture Deadlines, Transfer of Grandfathered Radio Station Combinations

Additionally, NPM and NFCB commend the Commission on its recent revisions (1) granting duopoly priority to entities funding or incubating eligible entities, (2) extending divestiture deadlines in mergers where applicants have actively solicited bids for divested properties from eligible entities, and (3) allowing for the assignment or transfer of grandfathered station combinations to buyers who commit to assign excess stations to an eligible entity.²¹ These revisions satisfy the concerns of the Native American communities represented by NPM and NFCB, and will adequately meet their needs should the Commission adopt the definition of "eligible entity" proposed above.

E. Share-Time Proposals

The Commission seeks comment regarding a proposal to afford FM licensees that broadcast in HD using IBOC technology the voluntary option of assigning the right to operate an HD radio stream to a small disadvantaged business ("SDB" or eligible entity).²² The SDB would receive a license under the Commission's share-time rules and own a "Free Speech Station" with at least 20 non-nighttime hours of airtime per week. This would allow an SDB the right to operate HD channels on a station that could not otherwise be owned by the proposed licensee.

NPM and NFCB support enhanced opportunities for SDBs or eligible entities where Native Americans are included in the definition of such terms. However, NPM and NFCB do not advocate for space only on second channels to serve underrepresented or underserved Native Americans at the expense of having no Native American presence on primary first channels. The demographics of the United States are changing and having more of the same broadcast services

²¹ NPRM at ¶¶ 56-57, 61.

²² *Id.* at ¶ 87.

for the same audiences is not progress. Remaining invisible on mainstream first channels remains a problem and relegating Natives, minorities, and women to second, third, or lower channels as an overall panacea is not the answer in itself. NPM and NFCB support further progress for minority- and women-owned broadcasting stations on secondary as well as primary channels.

F. Reallocation of TV Channels 5 and 6 for FM Service

Currently, many community stations are constricted by the interference protection for Channel 6 TV stations.²³ The Commission asks commenters to discuss a proposal advanced by Mullaney Engineering, Inc. advocating the reallocation of TV Channels 5 and 6 for FM broadcasting.²⁴ NPM and NFCB fully support this proposal and agree that it will create a "staggering expansion of the existing FM band," which could serve to enhance ownership diversity and new entry into the non-commercial broadcasting sector.

NPM and NFCB also support white space technologies and the use of white space to create opportunities and innovation in reaching out to Native American communities. At a time when broadband connectivity is increasingly important, white space technologies could become an incredibly useful tool for addressing shortcomings in broadband access and affordability. White space devices could help to bridge the digital divide in Indian Country and bring wireless broadband service to rural and underserved communities. White space would also give Native communities an additional communications option from which to choose.

NPM and NFCB support the Commission's white space scientific data collection and bench testing to determine the feasibility of white space technology and develop the test criteria

²³ We understand that Channel 6 is not an ideal frequency for digital TV signals. NPM and NFCB advocate limiting the expansion to Non-Commercial Educational ("NCE") stations.

²⁴ *Id.* at ¶ 100.

for future devices. NPM and NFCB call upon the Commission to share information about its development in white space technology, data collection, and testing with Native American communities through the annual Intertribal Telecommunications Initiative outreach. NPM and NFCB would like to work closely with the Commission and policymakers to craft rules that will realize the opportunity of TV white space.

IV. COMMENTS REGARDING FCC POLICY AND PROCEDURES

A. Ban on Discrimination, "Zero Tolerance" Policy, Non-Discrimination Provisions

NPM and NFCB commend the Commission for policies adopted to prohibit discrimination and ownership fraud in the broadcasting services.²⁵ NPM and NFCB fully support a total ban on discrimination in broadcast transactions, as well as a certification from broadcasters renewing their license(s) that their advertising contracts contain nondiscrimination clauses. The zero tolerance policy for ownership fraud advanced by the Commission establishes a strong commitment to diversity in the communications industry.²⁶

B. Local and Regional Bank Participation in SBA Guaranteed Loan Programs, "Access to Capital" Conference, Guidebook on Diversity

Further, NPM and NFCB support the Commission's decisions to (1) work closely with the SBA to educate and encourage more local and regional banks to participate in SBA-guaranteed loan programs to facilitate broadcast and telecommunications-related transactions, (2) hold an "Access to Capital" conference that will discuss financing and entry to ownership in the communications sector, and (3) create a guidebook entitled *Increasing Diversity in the Media*

²⁵ *Id.* at ¶¶ 40, 43, 49.

²⁶ In the NPRM, the Commission cites 47 U.S.C. § 309(j)(4)(D), which allows the Commission to consider "tax certificates, bidding preferences, and other procedures," to support its ability to promote opportunities for "businesses owned by minority groups and women." NPRM at ¶ 41 n.89. NPM and NFCB ask that the Commission specifically consider Native American organizations and Tribes when making these decisions.

and Telecom Industries that will provide the industry with "comprehensive information on what diversity initiatives are most likely to have an impact and how companies can most effectively implement those initiatives."²⁷ These educational efforts will enhance awareness about the benefits of greater diversity in broadcasting and promote opportunities for minority- and women-owned businesses.

C. Longitudinal Research on Minority and Women Ownership Trends

NPM and NFCB agree that the Commission should conduct annual longitudinal studies of Native American, minority, and women ownership that can provide important feedback to the Commission on the impact of its rules and policies regarding access to capital, availability of spectrum, and the opportunities and ability of Native eligible entities to serve Native Americans.²⁸ Accurate information regarding trends and the effects of the Commission's policies will facilitate the establishment of policies and programs that can identify the specific needs of certain minority- and women-owned stations. When conducting these studies, NPM and NFCB urge the Commission to include Native American ownership data, no matter how small, in these longitudinal studies in order to achieve its goal of increasing diversity in media ownership "based on the record" of ownership data.

V. CONCLUSION

The measures proposed by the Commission to enhance opportunities for new entrants and small businesses in the broadcasting services would be a significant step towards "strengthen[ing] the diverse and robust marketplace of ideas that is essential to our democracy."

²⁷ *Id.* at ¶¶ 54, 62, 64. NPM and NFCB request that the Commission specifically mention Native Americans in the guidebook in order to facilitate more opportunities for Native American broadcasters and create more Native American programming.

²⁸ *Id.* at ¶¶ 51-53.

In its endeavor to increase diversity, competition, and ownership among small businesses and new entrants, NPM and NFCB urge the Commission to continue to consider the issues confronting, and barriers faced by, Native American broadcasters. NPM and NFCB look forward to working with the Commission to ensure the continued, increased provision of programs and establishment of goals targeted at strengthening broadcast diversity and promoting ownership opportunities for underrepresented communities.

Respectfully submitted,

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