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

In the Matter of	)	
	)	
Broadcast Localism	)	MB Docket No. 04-233
	)	

To the Commission

SUPPLEMENTAL COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL AND THE INDEPENDENT SPANISH BROADCASTERS ASSOCIATION IN RESPONSE TO THE REPORT ON BROADCAST LOCALISM AND NOTICE OF PROPOSED RULEMAKING

The Minority Media and Telecommunications Council ("MMTC") and the Independent Spanish Broadcasters Association ("ISBA") respectfully request consideration of these supplemental comments in response to the Report on Broadcast Localism and Notice of Proposed Rulemaking ("Localism NPRM").[1] These supplemental comments will address the Commission's proposed reversion to the pre-1987 main studio rule[2] (the "MSR"), which required each station to have a main studio in its community of license ("COL").

As stated in our initial comments,[3] MMTC and ISBA have assembled data to quantify the impact that the MSR would have on minority broadcasters.[4] We remain opposed to the MSR because it would impose a far greater disadvantage on broadcasters who entered the industry later and were thus unable to assemble clusters of stations which each shared the same community of license ("COL").

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[1] Broadcast Localism, Report and Notice of Proposed Rulemaking, MB Docket No. 04-233, 23 FCC Rcd 1324 (2007) ("Localism NPRM").
[2] Id. at 1343-44 ¶41.
[3] Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association in Response to the Report on Broadcast Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, p. 9 (April 28, 2008) ("Initial Comments").
[4] See Statement of Frederick Holt, Ph.D, in Response to the Report on Broadcast Localism and Notice of Proposed Rulemaking, App. B (May 8, 2008) ("Holt Analysis") (attached).

The Commission believes it possible that an increase in locally originated programming might result from the interactions between the station and its audience that would flow from greater accessibility of main studios.[5] This premise flows from the origin of the main studio rule as a means of implementing Section 307(b) of the Communications Act, which requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a *fair, efficient, and equitable* distribution of radio service to each of the same."[6] As stated in our Initial Comments,[7] and demonstrated herein, the proposed reversion to the MSR would neither be fair, efficient, nor equitable for minority broadcasters because the rule would act as a tax on late entry.

History of The Commission's Misadministration of Minority Ownership

While its recent adoption of thirteen initiatives to address minority under-representation in broadcast ownership is important for the future of minority broadcasting,[8] the agency's misadministration of minority ownership in past generations is well documented.[9] Owing to societal discrimination that was facilitated by the Commission,[10] minority broadcasters entered the business two generations later than other broadcasters. In the 1930's, the FCC and its predecessor agency did not permit minorities or those seeking to serve non-English speaking immigrants to obtain licenses.[11] Many Eastern European immigrants obtained their licenses after

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[5] Localism NPRM, 23 FCC Rcd at 1343-44 ¶41.
[6] 47 U.S.C. §307(b) (2006) (emphasis added).
[7] Initial Comments at 8-9.
[8] Promoting Diversification of Ownership In the Broadcasting Services (R&O and Third FNPRM), MB Docket No. 07-294, 23 FCC Rcd 5922 (released March 5, 2008), 73 Fed. Reg. 28361 (May 16, 2008) ("2008 Diversity Order").
[9] See Antoinette Cook Bush and Marc Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. 423, 439 (1996) ("Bush and Martin") (discussing the Commission's failure to grant minorities radio and television licenses until 1956 and 1973, respectively, as well as the bias in favor of non-minorities in comparative hearing procedures).
[10] For decades the Commission routinely and deliberately granted broadcast licenses to segregationist companies and colleges, thereby facilitating the exclusion of minorities from broadcast employment and ownership. See, e.g. Southland Television, 10 RR 699, recon. denied, 20 FCC 159 (1955) (holding that because Louisiana's movie theater segregation law was not inconsistent with the Communications Act, a segregationist movie theater owner could hold a television license).
[11] Eastern and Southern European Jewish immigrants often applied to built these stations to serve their own ethnic

World War II and, later, several of these broadcasters sold their stations to minorities.[12] When minorities finally gained a foothold in the industry, they were generally only able to acquire low-power, technically inferior stations that became available when the original owners retired.[13]

As a consequence of the Commission's misadministration of minority ownership, minorities did not receive radio or television licenses until 1949 and 1973, respectively.[14] Since few minorities were able to gain broadcast experience prior to this time, minorities were at a disadvantage in comparative hearings, a licensing methodology that awarded often dispositive comparative credits to broadcast applicants with "past broadcast experience" and "past broadcast record."[15] Until the courts intervened in 1973 and 1975[16] and the Commission adopted minority ownership policies in 1978 and 1982,[17] the Commission made no effort to remedy the palpable

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groups. In the years preceding World War II, the Commission frequently refused to grant their uncontested construction permit applications on the thin pretext that it didn't serve the public interest to broadcast in certain foreign languages, particularly Yiddish. See Voice of Brooklyn, 8 FCC 230, 248 (1940), Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), and Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936). These horrible anti-Semitic decisions must be read in the context of the U.S. government's contemporaneous underestimation and denial of the coming Holocaust.

[12] Examples of stations with such a history include Washington's WOL, New York's WWRL and WLIB, Philadelphia's WHAT, Baltimore's WWIN, Pittsburgh's WAMO, Boston's WILD, Buffalo's WUFO, Chicago's WBEE and Miami's WMBM.

[13] Minority broadcasters' preponderant ownership of stations with weak technical facilities was caused by the unavailability of more desirable facilities. The legacy and present status of minority ownership of stations with inferior technical facilities is described in Kofi Ofori's 2002 study, Consolidation and Minority Ownership, pp. 16-18 (appended to Comments of MMTC, MM Docket No. 01-317 (Radio Ownership), filed May 8, 2002).

[14] See Bush and Martin, supra note 9 (discussing how the Commission's flawed licensing practices for radio and television hindered minority media ownership). The relevant history is also detailed in the Initial Comments of Diversity and Competition Supporters, MB Docket 02-077 (2002 Media Ownership Proceeding), filed January 3, 2003, pp. 19-35.

[15] Id.

[16] See, e.g. TV-9 v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974) (requiring consideration of minority ownership in comparative hearings); Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) (requiring consideration of minority ownership in the administration of ownership regulations).

[17] The first Commission decision applying minority ownership as a factor in structural regulation was Atlass Communications, Inc., 61 FCC2d 995 (1976) (granting AM nighttime coverage waiver to promote minority ownership and programming relevant to the community, thereby reversing the Commission's policy denying such waiver requests). See also Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration). Thanks to Chairman Wiley's and Chairman Ferris' initiative, in 1978 the Commission adopted the distress sale policy and the former tax certificate policy. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1981); see also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) (relaxing ownership attribution rules to extend minority ownership credit to entities in which passive investors hold a majority stake but the entity is controlled by minorities).

exclusion of minorities from broadcast ownership. And until this year,[18] the Commission almost always refused to consider the impact on minority ownership of its spectrum management and structural multiple ownership policies.[19]

Present Effects of The Commission's Misadministration of Minority Ownership

As a result of the Commission's flawed policies, non-minority broadcasters -- insulated from competition from minorities -- were able to obtain "beachfront property" --- stations with strong signals, licensed to major cities. Minority and ethnic broadcasters who entered the market later generally had to accept stations with weaker signals licensed to suburban communities.[20] Today's non-minority broadcasters, including very early entrants and their descendants through mergers and acquisitions, typically maintain clusters of stations each licensed to the largest COL in a market. Minority and ethnic owners frequently have had to assemble clusters of stations licensed in several separate, suburban COLs.[21]

The Los Angeles market presents one of many examples of how late entry plays a role in determining the COLs of stations in a cluster. Clear Channel Communications owns nine stations in the market, eight of which are licensed to Los Angeles. Hispanic owned Liberman Broadcasting owns six stations in the Los Angeles market, one of which is licensed to the city of Los Angeles and five of which are licensed, variously, to four different suburban communities. Thus under the MSR, *Liberman would require five main studios for its six stations, while Clear Channel would only require two main studios for its nine stations*.

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[18] The first Commission decision in a decade to seriously consider the impact of structural policies on minority ownership was the 2008 Diversity Order, supra.

[19] See, e.g. Technical Assignment Criteria for the AM Broadcast Service (R&O), 6 FCC Rcd 6273 (1991), recon. granted in part and denied in part, 8 FCC Rcd 3250 (1993) (subsequent history omitted) (permitting only incumbents to colonize the 1605-1705 kHz band and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band's expansion in the Commission's planning for (and the U.S. delegation's advocacy in) the 1979 WARC)).

[20] See Ofori, supra note 13.

[21] See Holt Analysis, App. B.

To quantify the MSR's impact on minority owned and ethnic broadcasters, MMTC's statistician, Dr. Fredrick Holt, analyzed data on the 458 clusters in the top 50 radio markets.[22] Using a t-test analysis, it appears that on average, clusters that are minority owned and/or ethnic programmed have between a 12% and 16% smaller share of their total stations licensed in the largest COL.[23] This means that under the MSR, minority owned and/or ethnic programmed clusters will have over one-third fewer stations per required studio.[24] Using regression analysis and controlling for market size, the share of minority owned and/or ethnic programmed stations clustered in the largest COL is 22% to 36% less than the corresponding share for non-minority clusters.[25] As such, the proposed rule would result in minority owned and/or ethnic programmed stations having approximately 1.25 fewer stations per required studio.[26] Dr. Holt concluded:

> I found evidence that the proposed reversion to the main studio rule of the early 1980s appears to be neither fair, efficient, nor equitable for minority owned and ethnic programming clusters. In particular – I found that minority owned and ethnic programming clusters have a smaller share of stations in the largest COL and fewer stations per studio required relative to the clusters not in these two categories. I found that these differences are relatively large, statistically significant, and that they hold up when one controls for market size. These calculations suggest that minority owned and ethnic programming clusters will face a much higher burden meeting the proposed reversion to the pre-1980s main studio rule.[27]

Thus, reverting to the pre-1987 main studio rule would ratify and replicate the present effects of past discrimination. Requiring each station to have a main studio in its COL would not "encourage broadcasters to produce locally originated programming."[28] Instead, such a requirement would diminish local programming by heightening the profound financial challenges faced by the very broadcasters that historically have shown the greatest dedication to local service: minority owners. As the Commission has repeatedly found, minority

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[22] Holt Analysis at 2.
[23] Id. at 5.
[24] Id.
[25] Id. at 7.
[26] Id.
[27] Holt Analysis at 8.
[28] Localism NPRM, 23 FCC Rcd at 1344 ¶41.

broadcasters' greatest obstacle to entry is access to capital.[29] Construction and operation of a main studio is very expensive. Thus, a company required to build more studios will not be able to offer investors the competitive returns on investment ("ROI") that its competitors can deliver. Suppose a new investor is presented with two otherwise equally qualified candidates: a non-minority broadcaster that can offer a 30% ROI, and a minority broadcaster which – thanks to greater studio leasing, construction and maintenance costs – can only offer a 25% ROI. Since capital goes where it's welcome, the non-minority broadcaster would receive all of the newly invested capital and the minority broadcaster would receive an investment of zero.

Even apart from the MSR's deeply disproportionate impact on minorities, the MSR would impose enormous costs on radio broadcasters generally, thus discouraging investment in the industry as a whole. In that sense, the MSR would be "a receding tide that sinks all boats."[30] The MSR's costs to the radio industry generally would exacerbate the rule's disproportionate injury to minority broadcasters specifically, since minority media investments are so heavily invested in radio as opposed to other media technologies.[31]

Conclusion

Reintroduction of the pre-1987 main studio rule would operate as a tax on late entry. Because minorities' late entry was caused by racial discrimination, the rule would operate as a

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[29] See, e.g., 2008 Diversity Order, 23 FCC Rcd at 5937 ¶34 ("We find sufficient evidence in the record to show that difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry.")

[30] Apologies to President Reagan.

[31] In the example given on p. 4 supra, it would be no consolation to minority broadcasters that Clear Channel Communications would have to build a second Los Angeles-area studio. Because the construction of main studios is expensive for all broadcasters having to build them, the MSR would drive capital away from broadcasting and into competing industries that are free of MSR obligations. Radio has been by far the leading entry portal for minorities in electronic media and telecommunications. While minorities are virtually shut out of wireless and cable system ownership and own just 3.0% full power television stations, minorities own 7.78% of radio stations. See 2008 Diversity Order, 23 FCC Rcd at 5939, 5782 (citing Free Press statistics on radio and television ownership). Thus, a shift of capital away from radio would tend to visit disproportionate harm on minority media entrepreneurs.

"tax on Blackness and Brown-ness." In this way, the MSR would offend Section 307(b)[32] by ratifying the Commission's unfair, inefficient and inequitable distribution of licenses during the 20th century.

More than that, the proposed reversion to the MSR offers a teachable moment. It is a textbook example of a rule aimed at advancing one laudable objective that would, in practice, undermine the agency's pursuit of another equally laudable objective. In this instance, even if MSR would advance localism, it would diminish diversity.[33]

Respectfully submitted,

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Attachment (Statement of Dr. Fredrick Holt and exhibits thereto)

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[32] 47 U.S.C. §307(b) (requiring the Commission to "provide for a fair, efficient, and equitable distribution of radio service").

[33] Some regulations are cost-effective and promote diversity, the best example being the broadcast EEO rule, 73 C.F.R. §73.2080 et seq. However, it is not uncommon for a command-and-control regulation to impose costs that undermine diversity. See, e.g., Thomas W. Hazlett, Shedding Tiers for A La Carte? 5 J. Telecom and High Technology Law 253, 281-82 (2006) (explaining how FCC-mandated cable channel tiers would, inter alia, impede new entry and undermine minority program services). Hazlett explains that "constraining the size of the expanded basic tier imposes costs on both subscribers and program networks. Asking households to select exactly those channels they will watch later in the month (or year) is a demanding, time-consuming request. It is expensive, requiring company staff personnel and, in most cases, digital set-top boxes. And because nothing is saved by eliminating a program network from a given cable TV connection, the dividend promised by a la carte fails to materialize." Id. at 271.