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

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In the Matter of	)	
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Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	

To the Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF NAACP AND LULAC

The National Association for the Advancement of Colored People ("NAACP") and the League of United Latin American Citizens ("LULAC") ("Civil Rights Organizations") respectfully submit their initial Comments in response to the Notice of Proposed Rulemaking in the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings, FCC 92-98 (released April 10, 1992) ("Comparative Hearing Policies NPRM").

Since it has been a generation since the Commission systematically reviewed its comparative hearing policies, the Civil Rights Organizations wish to approach the task with the requisite deliberation and depth. Therefore, the Civil Rights Organizations' Comments herein are tentative, and they reserve the right to modify and refine their views on this matter upon review of other comments.

BACKGROUND

When the history of broadcasting in the 20th Century is written, it will be characterized as the period dominated by the division of the spectrum among willing and eager claimants. Once the spectrum is gone, the policy choices made in selecting the chosen occupants will haunt us for decades and be literally impossible to reverse.

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We are at the twilight of the great spectrum rush which began in the 1920s and which will conclude by the turn of the century. Docket 80-90 is over. Consequently, this proceeding will govern the apportionment of the last of the most valuable FM facilities.

Essentially all of the most valuable television and AM facilities are long since licensed. Minority ownership opportunities have been all but foreclosed for the expanded AM band and are unlikely to obtain in connection with DAB or HDTV.

At stake in this spectrum rush are the social, political and cultural diversity of the country. These are intangibles which the Commission has long chosen to allocate primarily through its ownership rules rather than through direct program regulation. To promote these intangible goals, the Commission relies heavily on its minority ownership policies, going so far as to use them as a shield whenever it deregulates in another area.[1/]

1/ In Deregulation of Radio 73 FCC2d 457, 482 (1979) (notice of proposed rulemaking), the Commission reassured the public that "[e]fforts to promote minority ownership [citing Statement of Policy on Minority Ownership of Broadcast Facilities, supra] and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id. at 977.

(n. 1 continued on p. 3)

At this point in the history of broadcasting, equity must be the primary objective. Every American enjoys at least one broadcast service. Most communities receive service from many services, and nearly all communities of substantial size boast a number of competing local services. Thus, the principal objectives of the Commission in implementing Section 307(b) of the Act have been achieved. See Clear Channel AM Broadcasting, 78 FCC2d 1345, 1349 (1980) (subsequent history omitted).

1/ (continued from p. 2)

Indeed, under radio deregulation, if one station in a market is serving minorities, no other station in the market is required to do so. Id. at 991. This was a very dramatic change from the regulatory structure which had been in place for at least a generation. Compare En Banc Programming Inquiry, 44 FCC 2303, 2314 (1960) and Public Service Responsibility of Broadcast Licensees 15 (March 7, 1946) (the "Blue Book") (each station is expected to serve minority groups).

See also Amendment of §73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 FCC2d 587, 599 (1979) (separate statement of Chairman Ferris), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 Rad. Reg. 2d (P&F) 1221 (1985), aff'd sub nom. NBMC v. FCC, 882 F.2d 277 (2d Cir. 1987); Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules, 102 FCC2d 548, 558 (1985), recon denied, 4 FCC Rcd 5218 (1989); Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels, 3 FCC Rcd 3597 (1988), recon. denied, 4 FCC Rcd 4711 (1989).

The courts have approved the Commission's reliance on minority ownership as a preferred means of addressing diversification goals. NAACP v. FCC, supra, 682 F.2d at 1004 (D.C. Cir. 1982) (holding that the Commission "has not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.").

Robust minority participation in ownership is the last remaining task facing the Commission in shaping the spectrum to foster diversity. We lack ownership diversification to match the melting pot. The nation's population has melted into the pot while media ownership is largely frozen. The facade presented by the media industry is overwhelmingly White, calcified and forbidding to the small, new entrant, whose last hope for a piece of the spectrum pie is at stake in this rulemaking proceeding.

The task of parcelling out the last crumbs of the spectrum is a delicate one. It should be accomplished giving first priority to equity and second priority to expedition. Short-sighted procedures sacrificing equity and due process to gain a few months advantage in the initiation of new service would disserve the public.

RESEARCH ON COMPARATIVE HEARINGS

Notwithstanding the seriousness of these issues, there has been almost no academic research on the comparative hearing process. From the 1965 Policy Statement, 1 FCC2d 393 (1965) to the present, Commission policy in this area has been set by vibration and intrinsic feel rather than by rigorous analysis.

To remedy this patent deficiency in the state of knowledge about the comparative hearing process, the Minority Media Ownership Litigation Fund has undertaken a systematic review of all commercial FM comparative hearings which originated with a Report and Order amending the FM Table of Allotments (47 CFR §73.202) and concluding with an Initial Decision of an Administrative Law Judge awarding a permit. The time period under review is January 1, 1986 through December 31, 1991. At this writing, the study has been in process for approximately two months, and our analysis of 1986 and 1987 is nearly complete. We have brought on and trained additional staff in an effort to complete our research reasonably soon, although realistically it cannot be finished by the time Reply Comments are due. It is our intention, however, to widely disseminate the results, and move for their inclusion in the record immediately upon completion of peer review and publication regardless of their outcome.

Our research seeks to identify which comparative factors were outcome determinative, which factors correlated with minority status, and which factors correlated with the status of being a "finder", the individual who sought the amendment to the FM Table. That is why these cases are being traced from the Report and Order stage.

The Civil Rights Organizations note that this research is complex and tedious, and they would welcome the voluntary assistance of interested parties or their counsel, regardless of their views on the underlying policy questions.

MINORITY OWNERSHIP, INTEGRATION AND THE ANAX RULE

In perhaps no other task is the Commission's public interest mandate more fundamental than in the issuance of new broadcast permits. This is the means by which nonminorities, exclusively, won the rights to the most valuable permits essentially for free at a time when legal segregation still reigned. During that time, it would have been unthinkable for minorities to have had the temerity even to apply for a broadcast permit. To understand why, some historical context is necessary.

Until about the middle 1970's, the FCC openly tolerated and ratified discriminatory actions by its licensees. It routinely provided broadcast licenses to colleges and universities which were totally segregated (eg., WBKY-FM, University of Kentucky, licensed in 1941; WUNC-FM, University of North Carolina, licensed in 1952; KUT-FM, University of Texas, licensed in 1957, among many others). In this way, the FCC endorsed and facilitated segregated broadcast education, thereby giving Whites a substantial headstart in access to broadcast employment.

Southland Television Co., 10 RR 699 (decided 1955, reported 1957), recon denied, 20 FCC 159 (1955) illustrates the Commission's racial policies at mid-century. The FCC had before it a Shreveport TV station applicant who owned segregated movie theatres. This man had built his movie theatres without balconies to circumvent a Louisiana law which allowing the admission of Blacks as long as they sat in the balconies. He even owned a segregated drive-in theater; all the other drive-ins were integrated (at least as to admission, although not as to the occupants of the automobiles).

The FCC held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theatres, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR2d at 750. Thus did the FCC give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.

When faced with broadcast cases arising out of the civil rights movement, the FCC's decisions reflected the timidity and insensitivity of the national administration. In Broward County Broadcasting, 1 RR2d 294, 296 (1963), the Commission set for hearing the license of a small Florida station which proposed to address a small portion (17%) of its programming to the Black community. The reason: local White citizens had complained that the station was licensed to an all-White town which didn't need that type of music.[2/] When the station dropped the programming, the FCC quietly dropped the charges.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965), the Commission was faced with a radio licensee who had used his station to help incite the riot which took place at the University of Mississippi when James Meredith attempted to enroll. The Commission merely admonished the station.

2/ The White citizens were motivated by the possibility that Blacks would hear their "local" station broadcasting gospel music, and would then attempt to integrate the then all-White town. That particular station today is Black owned, and the town is now racially integrated.

The federal courts soon became impatient with the FCC's racist policies. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I") the Court of Appeals ordered the FCC to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council/Ku Klux Klan viewpoint on racial matters, and which went so far as to censor its own NBC network news feeds with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. This case was highly significant because it upheld, for the first time, the principle that individual citizens, because of their investment in television and radio receivers, have standing to challenge television and radio licenses.

After a very one-sided hearing in which the FCC renewed WLBT-TV's license again, the Court ordered the FCC to deny the license renewal. The Court has never before or since taken such an action, but this time it held the administrative record to be "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) ("UCC II").

After a further hearing lasting eleven more years, a company headed by Aaron Henry, President of the Mississippi State Conference of Branches, won the license. It still owns the station. WLBT-TV, which previously only employed a Black janitor, now has a 50% Black staff and a Black General Manager. Since 1980, WLBT-TV went from third to first in the audience ratings and has stayed there.

The FCC's new antidiscrimination policy was applied haltingly and sporadically at first. In Chapman Television and Radio Co., 24 FCC2d 282 (1970), the FCC had before it an applicant for Birmingham, Alabama TV Channel 21. That applicant, a man who owned part of the stock in a Birmingham cemetery, had participated in the cemetery's 1954 decision to exclude Blacks. The cemetery's policy came to light when the cemetery turned away the body of a Black war hero. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.[3/] The FCC ordered a hearing only into why the applicant had covered the matter up, not into whether a practicing segregationist had the moral character to be a federal licensee. Even the cover-up allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR2d 887, 895 (Examiner 1971).

3/ This was a classic red herring: twenty-two years earlier, the Supreme Court had ruled that restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948).

Chapman was not an anachronism. Long before minorities owned or applied for broadcast licenses, the FCC openly discriminated on the basis of national origin. In 1938, in what would now be seen as a clear violation of the First Amendment, the Commission rejected the only applicant for a radio license, holding that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group [of speakers of foreign languages] ... the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938). See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936), Voice of Brooklyn, 8 FCC 230, 248 (1940).

These pre-World War II cases involving, inter alia, Yiddish language programming probably reflect anti-Semitism. The programming was largely intended for Jewish immigrants who had fled Germany and Poland. It surely reflected a climate in which none but WASPs could hope for access to the airwaves. In this atmosphere, it would have been unthinkable for Blacks or Hispanics to seek broadcast licenses.

Indeed, the Commission later directly imposed its Voice of Detroit regime on those seeking to serve Black audiences. In 1360 Broadcasting Company, 36 FCC2d 1478 (Rev. Bd. 1968), the Commission refused to waive a minor technical rule to allow a first nighttime radio service to 98.1% of Baltimore's Black community. Review Board Member Joseph Nelson dissented, pointing out that the Commission "has granted waivers or found substantial compliance with the rule where coverage was less than 100%" (citing cases, all involving new service to Whites, where proposed coverage would have been 90.2%, 95% and 90.6%). Yet the Commission persisted in this deliberately discriminatory licensing policy. See Mel-Lin, Inc., 22 FCC2d 165 (1970), (Jacksonville, Florida); Champaign National Bank, 22 FCC2d 790 (1970) (Champaign, Illinois).4/

The Kerner Report (1968) recognized the mass media's failure to foster interracial communications. The report charged racism in the media with helping cause the 1960s' civil disturbances. Most significant was the Report's findings of lack of sensitivity of the White press:

> The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he calls the "white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society.

Id. at 203.

4/ Not until 1976, in a case involving Johnson Publishing Company's WJPC-AM, did the Commission reverse itself. Atlass Communications, Inc., 61 FCC2d 995 (1976) (Chicago, Illinois).

Citing the Kerner findings, the FCC recognized a nexus between EEO and program service and held that discrimination in broadcasting is unlawful. Nondiscrimination in Broadcasting, 13 FCC2d 766 (1968). The FCC mailed Chapter 15 of Kerner Report to every broadcast licensee. In deciding that its own EEO rule was needed to regulate broadcasters, even though the EEOC has been created to enforce Title VII, the Commission cited with approval this statement by the Department of Justice:

> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

Nondiscrimination in Broadcasting, supra, 13 FCC2d at 771. Soon thereafter, in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir, 1973), the minority ownership policy followed. We are still in the first generation of a very tenuously applied policy which, given a chance, might do something to reverse decades of institutional, government sponsored as well as private discrimination.

The need to promote diversification of information through diversification of ownership has been thoroughly documented, and it has been the touchstone for all of the Commission's minority preference policies. Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990). Diversification-promoting policies are especially needed now, given the potential for media concentration and competitive disadvantages to small and minority broadcasters attendant to the recent relaxation of the multiple ownership and duopoly rules. See Radio Multiple Ownership (R&O), FCC 92-97 (released April 10, 1992).

Yet as shown above, diversification is not the only reason the minority preference policies can be justified. If justified based on the need to reverse past discrimination, integration of ownership and management would be irrelevancies. None of the minority contracting programs governed by redressing past discrimination require the minority beneficiaries to be the general managers of the business. See, eg., Fullilove v. Klutznick, 448 U.S. 448 (1980).

It is noteworthy that the Metro outcome, as to distress sales, was not dependent upon integration of ownership and management. In Las Misiones de Bejar Television Co., 56 RR2d 1481, 1483 (1984) (dissenting statement of Commissioner Henry M. Rivera), Commissioner Rivera wrote:

> there is a "serious gap" between the value Congress, the courts and the FCC say should be attached to minority ownership and the value that is actually assigned to such ownership in comparative broadcast cases. In view of the continued representation of minorities in broadcast ownership, and the clear federal interest in remedying the problem, restriction of comparative credit to instances in which minority owners will be integrated into management is inexplicable as a matter of policy, and questionable as a matter of law -- particularly where, as here, minority participation will have significant public interest benefits.

Therefore, at least tentatively, there is something to be said for the elimination of integration as a comparative factor in hearings yet to be designated.[5/] If this happened, minorities already successful in business, but not in a position to operate a broadcast station personally, would have a realistic chance of winning a permit without the need to join forces (legitimately or illegitimately) with a potential general manager.

Sometimes, integration and its attendant encouragement of two-tiered applicants, does inure to the benefit of minorities unable to finance their projects any other way.

Therefore, the Civil Rights Organizations strongly support retention of the Commission's policy in Anax Broadcasting, Inc, 87 FCC2d 483, 488 (1981) ("Anax") allowing genuine two-tier companies to attribute only their voting shareholders or general partners. See Minority Ownership in Broadcasting, 92 FCC2d 859 (1982).

Without integration, the Anax policy is less likely to result in a proliferation of sham applicants. Comparative hearings have been successful in uncovering such shams, and the elimination of for-profit settlements are likely to greatly reduce the number of such shams. The new settlement policies seem already to have reduced the number of speculative applicants.

5/ If the Commission rejects this approach and abolishes Anax, it should do so only prospectively. Many valid and worthwhile applicants relied in good faith on Anax in forming their companies and partnerships. See Las Americas Communications, Inc., 5 FCC Rcd 1634, 1636 (1990) (prospective rulemakings are preferred for due process purposes); cf. Bowen v. Georgetown University Hospital, 488 U.S. 204, 217 (1988) (APA definition of rule having "future effect" must mean "that rules have legal consequences only for the future") (Scalia, J., concurring). Two-tier applicants who applied and invested money in good faith under present policies should not have their legitimate expectations dashed without warning.

The type of applicant Anax benefits are minorities with careers in broadcasting, or with careers in civil rights in which they have interfaced significantly with broadcasting, who are ready to own their own stations but are unable to afford it without investors. That type of applicant is highly likely to provide alternative viewpoints over the airwaves. Eliminating the financing opportunities attendant to legitimate two-tier applicants will only exacerbate the extreme difficulties minorities have had in financing entry into station ownership.

The elimination of Anax would reverse many of the minority ownership gains of the past decade. Before Anax, minorities seldom won comparative hearings. Without the assistance of interested investors, many minorities simply lacked the resources to file applications without passive investors.

Now is hardly the time for the Commission to reduce opportunities for minority ownership. There is no less of a need for expanded minority ownership now than there was when Anax was decided. See Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) (Commission "does not argue, nor could it, that the need for equal employment opportunity has become less urgent" since EEO enforcement began in 1969.)

If process abusing sham applicants remain a problem if Anax remains, the Commission should deal directly with that problem. It can do this by taking steps to help assure that voting owners maintain control. The Commission can do this in several ways:

(1) Extend the insulation provisions attendant to RULPA styled limited partnerships to two-tiered stock corporations.

(2) Require two-tier permittees who won their construction permits in comparative hearings to certify, in their applications for licenses to cover the permits, and in each subsequent ownership report for the succeeding three years, that the voting owners have maintained both voting and operating control, presently are in control, and will continue to maintain control. The license to cover is the appropriate occasion on which to obtain this information, since its purpose is to verify that all conditions of the construction permit have been met.

(3) Require two-tier permittees, in their applications for licenses to cover, to show the basis upon which the construction of the station was financed, and the basis upon which initial operations will be financed. Copies of any agreements between the voting owners and the non-voting owners, as well as any documents involving the station to which the non-voting owners are a party, should also be provided with the license to cover application.

(4) Direct the Field Operations Bureau staff to randomly check two-tier licensees who secured their original permits in comparative hearings to insure that the voting owners are in fact maintaining control. See 47 CFR §0.111(a) (delegation of authority to FOB).

(5) Require the voting parties in two-tier applicants for radio permits to have and retain at least a 20% interest in the applicant. Minority Ownership in Broadcasting, supra, 92 FCC2d at 855 n. 28 (20% equity ownership is appropriate, "reflecting the realities of the financial and business world.")

(6) Issue forfeitures against the nonvoting stockholders or limited partners of sham applicants; that procedure should also be applied to real parties in interest in one-tier applicants.

These policy adjustments, together with the benefits of a no-profit settlement policy, should eliminate most shams while allowing retention of the genuine minority ownership and diversification promoting benefits of Anax.

ENHANCEMENT FACTORS

If integration is eliminated, comparative hearings must still include some enhancement factors as independent preferences, but only to the extent that absent integration, they are still predictive of service in the public interest.

For minority ownership, that is the case. As the distress sale and tax certificate policies implicitly recognize, minority ownership per se promotes diversification.

For broadcast experience, that is sometimes the case. However, the 1965 Policy Statement was correct in recognizing that such experience can be learned on the job, and therefore should receive only slight credit. 1 FCC2d at 396. Too much credit for this factor will only reinforce the present effects of past and present discrimination in broadcast employment.

Nor is more credit necessary. Broadcast experience is attractive in a comparative applicant beyond its weight as an enhancement factor, since experienced applicants tend to put together more credible proposals and defend them better in hearing.

As noted above, broadcast experience credit tends to be available mostly to nonminorities because past discrimination has prevented the full enjoyment of broadcast employment by minorities.6/ This deficiency in Commission policy is exacerbated further by the ridiculous "daytimer preference" which was created to "balance" the minority preference. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987). The theory behind the daytimer preference, which was not logical when adopted and is not logical now, is that by going off the air at sunset, a broadcaster somehow derives broadcast experience so valuable that it should neutralize a minority preference. In practice, it only institutionalizes the past discrimination which resulted in the current paucity of stations, daytimers (3% minority owned) or otherwise, owned by minorities.7/

6/ In United Steel Workers v. Weber, 443 U.S. 193 (1979), the Supreme Court held that exclusion of minorities from crafts on racial grounds was so well known it could be judicially notice. While broadcasting is a much smaller industry than steelmaking, the history of minority exclusion from broadcast employment has been so well known that it hardly bears repeating. See U.S. Commission on Civil Rights, Window Dressing on the Set (1977); Report of the National Advisory Commission on Civil Disorders, supra at 383-84 (finding that in journalism in 1968, fewer than 1% of management employees were Black, and most of these worked in Black owned organizations). Nonetheless, despite hundreds of EEO complaints, only once, in Catoctin Broadcasting of New York, 4 FCC Rcd 2553, 2558 (subsequent history omitted) has the FCC found that a licensee engaged in discrimination. The D.C. Circuit has repeatedly been critical of the FCC's failure to enforce its EEO Rule. Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988); National Black Media Coalition v. FCC, 775 F.2d 342 (D.C. Cir. 1985); Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978); Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977). Indeed, minority representation in broadcast employment remains well far parity with the representation of minorities in the population. See FCC Broadcast EEO Trends Reports, 1975-1990.

7/ See Columbus Board of Education v. Denick, 443 U.S. 449, 458-59 (1979) (14th amendment requires abandonment of policies which reinforce present effects of past discrimination).

Assuming for the sake of argument that such tinkering with broadcast experience preferences has some logic, it should follow that the experience of minority broadcasters, attempting to survive in an economic climate extremely hostile to them, deserves even more credit. Similarly, minorities with business experience, especially experience derived in the face of discrimination, should be awarded the equivalent of a daytimer preference. Such a "minority business experience" preference would recognize that a success in minority enterprise is highly predictive of success in broadcasting. That is especially -- but not only -- true when such experience was gained in an allied field, such as public relations, newspaper publishing, or journalism education. The range of occupations for which credit should be given need not be identified with precision at the outset. The comparative hearing process already has the flexibility to accommodate even entirely new credits and preferences. 1965 Policy Statement, supra, 1 FCC2d at 399.

Expansion of the broadcast experience credit in this manner would attract a larger number of sophisticated and economically successful minority business executives into broadcasting. Such individuals, who may have been discouraged early in life from pursuing a broadcast career owing to rampant discrimination in the industry, may have become quite successful in other occupations whose skills are readily transferrable to broadcasting.

This type of sophisticated minority applicant is unlikely to have any tolerance for sham proposals. Thus, a beneficial side effect of this proposal is that it would provide an incentive for the filing of genuine as opposed to sham applications.

Finally, the Commission should take this opportunity to reverse its 1985 holding that a nonminority applicant's broadcast experience may be considered even when "it occurred at a time when discrimination made it virtually impossible for a minority group member to acquire any comparable experience." Radio Jonesboro, Inc., 100 FCC2d 941, 946 n. 13 (1985) (subsequent history omitted) (crediting nonminority applicant's experience as a radio announcer in Arkansas in the 1950s; the applicant prevailed over a minority applicant). Credit for employment obtained at a time when Whites did not have to compete with minorities for broadcasting jobs only reinforces and manifests the present effects of past discrimination. The Radio Jonesboro holding, if not unlawful on its face, offends public policy and should be reversed.

Local Ownership and Civic Participation

Local ownership preferences would have limited meaning without integration. If an individual is going to be an absentee owner, it probably matters little whether she resides in the same city as the station or resides elsewhere. Local ownership credit, especially absent integration, may tend to keep out many of the minority broadcasters best prepared to become station owners: those whose success has moved them into operating positions in stations in large markets. Since there are no more FM permits available in large markets, the only broadcast-experienced minorities who can derive the benefit of local ownership credit are usually those whose careers have not yet launched them into large market stations: in other words, those who frequently are not quite ready to own and operate a facility.

It has been our experience that a great number of minorities in station sales and programming, having advanced to large markets and reached their mid-thirties, are ready to own their own stations. They would readily move to a smaller city to raise their children and start out as an owner/operator _if_ they were not inhibited by the unavailability of local ownership credit.

The absence of local ownership credit does not mean that the Commission must or should abandon the concept that a broadcaster should be sensitive to community needs. Indeed, it is far more likely that a Washington, D.C. resident with extensive involvement in voluntary civic activities, proposing to operate a station in Salisbury, Maryland, would serve the needs of Salisbury than a lifetime Salisbury resident who has never been involved in civic life there. In broadcasting, it is very common for managers to move from one city to another, and it is equally common for civically motivated managers to develop ties to new civic groups and activities soon after they relocate.

Therefore, we tentatively propose that civic participation, _wherever_ it occurred, should replace the present combined local/civic credit as the vehicle for predicting sensitivity to community needs. That change in approach would be consistent with the Commission's decision, in _Deregulation of Radio_, _supra_, that local needs can be met with nonlocal programming sources.

Often it is precisely the initiative, the fresh viewpoints of "outsiders" who most enrich and enliven a community: the history of the civil rights movement in the American South is the best example of this. Martin Luther King was chastised in the Montgomery Advertiser as an outsider from Georgia when he was selected to lead the bus boycott; idealistic northern college students were dismissed as "outside agitators" because they risked their lives helping southern Blacks register to vote. Most of the greatest American scientists and inventors of the 19th and early 20th century were "outsiders" originating from other countries.

In broadcasting, "localism" requires a willingness to learn and improve on the best of a locality. "Localism" does not require "locals" who sometimes have become either immune or insensitive to local needs.

Service Continuity

The proposed "service continuity credit" is a worthwhile concept. We have long favored station holding requirements to prevent trafficking. Such a credit could do much to eliminate shams and help render it unnecessary to eliminate the Anax policy.

The concept of service continuity can be instituted without creating a "credit" which every applicant will probably claim, spawning considerable litigation. Instead, the Commission can simply rule that applicants must hold a controlling interest in their stations for three years after winning them in hearing. If an applicant proposes to transfer control or sell within that time, it could do so only upon a distress sale to minorities for no more than 50% of fair market value.

We tentatively propose the 50% figure as a greater incentive to applicants not to file get-rich-quick applications, as well as a greater incentive for minority ownership if an applicant decides to cash in too quickly.

"Finders" Preference

The proposed "finders preference" is probably unlawful (at least when applied to proceedings containing a minority applicant) because it attempts to dilute and diminish the minority preference indirectly, a feat which could not be accomplished directly. Nearly all "finders" appear to be nonminorities. While a "finders" preference might stimulate some minorities to be "finders" in order to obtain a virtual lock on a frequency, it is far more likely to stimulate nonminorities to be finders so as to neutralize the minority preference.

Indeed, a "finders" preference will likely stimulate numerous spurious rulemaking proposals and counterproposals by those not genuinely intending to serve the public, but desiring simply to get a comparative lock on a frequency. The engineering cost of processing these proposals is beyond anything now in the Commission's budget, and would serve no genuine purpose.

Almost all "finders" have been nonminorities. This is not surprising, since all the work attendant to being a "finder" is done by the engineer, not the "finder." The good old boy network of engineers and their clients seldom includes minorities. About 150 engineers regularly do drop-in petitions and Form 301's. Only one is Black and one is Hispanic.

The practical effect of the "finders" preference, as presently articulated by its proponents, would be to neutralize and nullify the minority preference. Since nearly all new FM and TV proceedings include a "finder" as an applicant, a minority preference would be essentially without value in nearly every comparative hearing. If implemented, the finders preference would significantly reduce the economic incentives for minorities to apply for broadcast permits. Minorities would hardly be as eager to undergo the risk and torture inherent in a comparative hearing knowing that the "finder", who for all anyone knows could be David Duke, will have a preference whose effect is to nullify the impact of a minority preference.

The "finders" preference is illogical. There is no evidence whatsoever that the simple act of having an engineer file a rulemaking proposal makes someone a better broadcaster. At least the daytimer preference (discussed above) is available to people who have actually operated a radio station in the public view.

A "finder" could be -- and often is -- nothing more than an uninvolved client of an engineer. The "finder" may be someone motivated only by pecuniary interest, rather than public service.

More "finders" also mean more FM drop-ins. The Commission already has a greater caseload of FM drop-ins than its ALJs can handle with deliberate speed. The NAB has sought a freeze on new FMs. While such a freeze would be a mistake because it would artificially inhibit minority entry into the marketplace, there is no evidence that additional incentives are needed to stimulate more "finders."

There is hardly a need to further "balance" the minority preference by reaching for some criterion -- <u>any</u> criterion -- which looks like it might correlate with good broadcasting service. It has been said that when America sneezes, minorities in America get pneumonia; that is certainly true in the broadcasting business. NTIA's November, 1991 report on Minority Ownership Trends found that the number of minority owned commercial television and radio stations declined from 301 to 287 (from 2.9% to 2.7%) in just one year, even as the total number of stations was increasing. This represents a 4.7% decline in minority ownership in one year -- the first decline in the history of broadcasting.

In this climate, it is hardly a good time for the Commission to tinker with its preferences to suit the whims of yet another nonminority group at the expense of minorities.

The Commission is duty bound not to violate an Act of Congress, Pub. L. 102-140 (October 28, 1991), (specifying that "none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing...to expand minority and women ownership of broadcasting licenses[.]") Congress has spoken often and explicitly on the need to protect minority preferences from extraneous mischief. The House Conference Committee Report adopted in 1982, when Congress affirmed its support for the distress sale policy, stated: