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An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities - groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982). See also S. Rep. 182, 100th Cong., 1st Sess. 76 (1987) ("Diversity of ownership results in diversity of programming and improved service to minority and woman audiences.") By proposing an anti-minority "finders preference" which would surgically neutralize a minority preference, the Commission would intrude on the firm determination of Congress that the minority preference may not be diluted or nullified. The fact that such dilution would occur through the backdoor vehicle of a "finders preference" rather than through direct repeal of the minority preference is irrelevant.

Auxiliary Power, Comparative Coverage,
and Past Broadcast Record

Some comparative factors which are seldom applied and which serve little value except to enrich lawyers. These include auxiliary power and comparative coverage. No system of preferences is needed to stimulate economically motivated applicants to buy backup generators or reach as many listeners or viewers as possible.

Nor should the possibility of winning a second license be the primary motivation for serving the public with one's first license. "Past broadcast record", applied to a 97.5% white industry, only institutionalizes past and present discrimination. It should be eliminated as a relic of segregation days.

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Diversification/Multiple Ownership

We favor continued use of diversification as a comparative factor to promote new voices. For all its imperfections, the beauty of the comparative process is that almost every participant is new to broadcasting. Some are crooks, but the majority are decent people trying to provide a new service. We will withhold comment on the method of weighing diversification until our Reply Comments in order to first consider the views of other commenting parties.

ADDITIONAL COMPARATIVE FACTORS

In the Comparative Hearing Procedures MO&O, 6 FCC Rcd 3403, 3406 ¶33 (1991), the Commission announced that it would treat various proposals to revise the comparative criteria as a petition for rulemaking. The Civil Rights Organizations proposals sought, inter alia:

- (1) to permit interests held by Minority Enterprise Small Business Investment Companies to be treated as nonattributable;
- (2) to revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and
- (3) to award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value.

See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Report and Order) 6 FCC Rcd 157, 164 ¶52 (1990) ("Comparative Hearing Procedures R&O").

Those proposals have been placed in the docket of this proceeding. Comparative Broadcast Hearings (Order), FCC 92I-032 (released May 11, 1992). We briefly describe them here.

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A. Nonattribution of MESBIC Interests

The Civil Rights Organizations proposed that noncontrolling interests of qualifying MESBICS in broadcast applicants, whether present interests or future interests such as voting warrants, not be attributed in comparative hearing proceedings.

The Civil Rights Organizations made this proposal because the effect of the Commission's treatment of warrant interests effectively precludes most minority applicants from using MESBIC financing. Some MESBICs cannot provide financing to most new entrants without reserving to themselves a voting warrant interest. The Commission attributes these interests as though they are a present, nonintegrated, voting interest.

Thus, the cost of using MESBIC financing is usually the sacrifice of 100% integration credit. That generally means loss of the comparative hearing, since integration credit is so critical to the proposals of most applicants. 1965 Policy Statement, 1 FCC2d at 395. The result is that minority applicants are effectively deprived of financing from the very entities created to help them. See Storer Broadcasting Company, 70 FCC2d 709 (1979).

This can be remedied by a simple policy clarification stating that in light of the importance of MESBICs to minority ownership, their noncontrolling interests will not be attributed to an applicant. Inasmuch as this clarification would be limited to SBA-qualifying MESBICs, it would in no way undercut the Commission's multiple ownership rules. Instead, by facilitating the financing of minority broadcast ventures, the clarification would foster the diversification goal underlying the multiple ownership rules. See FCC v. NCCB, 436 U.S. 775, 796 (1978).

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B. Revised Minority Sensitivity Credit

The Civil Rights Organizations proposed that the Commission should revise the "minority sensitivity" credit derived from TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), rehearing denied en banc, 495 F.2d 941 (1974) (supplemental opinion) to provide that such a credit would be applicable to any proceeding and would not be available only for the purpose of offsetting another applicant's minority ownership credit.

This policy correction would reverse Colonial Communications, Inc., 5 FCC Rcd 1967, 1970 n. 5 (Rev. Bd. 1990) (holding that the minority sensitivity credit was only intended to be used against minorities.) The effect of the policy correction would be to encourage the licensing of minority-sensitive broadcasters even in proceedings where no minorities applied. Such applicants could be expected to be more likely than other nonminority applicants to hire and train minorities, and ultimately perhaps to sell their stations to minorities. Thus, "the benefits redound to all members of the viewing and listening audience." Metro, supra, 109 S.Ct. at 3011.

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Those seeking a minority sensitivity credit would continue to be held to a high burden of persuasion. In addition, the triggering test should be modified somewhat to focus on demonstrated past activities in broadcasting and civic activities, as opposed to mere promises of future minority-oriented activities.^{8/}

**C. Comparative Hearing Preference for
Sale of Station to Minorities**

The Civil Rights Organizations urged the Commission to provide applicants with a comparative hearing preference if they divest an FM or VHF TV station to minorities for no more than 75% of fair market value within one year after earning a permit. The station to be divested would not need to be the one sought in the hearing.

The preference would be available whether or not minorities are also applicants in the hearing, since the general public would receive the intended benefits regardless of which other applicants are in the hearing. See Metro, supra, 109 S.Ct. at 3011.

^{8/} See Chase Communications Co., 100 FCC2d 689, 692-93 (Rev. Bd. 1985) and San Joaquin TV Improvement Corp., 96 FCC2d 594, 600-603 (Rev. Bd. 1983) (considering promises of future minority sensitivity along with evidence of past minority sensitivity.) Allowing comparative credit for such easy-to-promise items as a minority advisory committee should be held to be contrary to the Commission's now well established policy that programming promises are seldom credited in comparative hearings. See Suburbanair, Inc., 104 FCC2d 909, 917-19 (Rev. Bd. 1986) (noting that program format changes may and do take place at the broadcaster's whim).

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The weight of this preference would be "moderate" -- roughly equal to the present weight formerly afforded to female ownership. The reason for having this preference count less than the weight afforded for minority ownership is that minority ownership through licensing is preferable to future minority ownership through purchase. Thus, one proposing this type of preference would not prevail against a comparable minority applicant in the same hearing.

To implement this provision, insure its effectuation, and prevent abuse, the divestiture commitment should be made a condition of the applicant's license. The condition could not be removed simply because the comparative hearing has been settled.

This policy would serve two important needs. First, it would provide a new vehicle by which nonminorities could help foster minority ownership. See Metro, supra; Minority Ownership in Broadcasting, supra, 92 FCC2d at 855; Statement of Policy on Minority Ownership in Broadcasting, 68 FCC2d 979, 983 (1978). At the same time, this approach would broaden the number of applicants whose licensing would result in the ascendancy into the ownership ranks of a minority.

POINT SYSTEMS AND TIE-BREAKERS

Our tentative view is that a point system for awarding preferences is inappropriate, because it would transfer to mathematicians, and away from judges, the ability to exercise discretion in deciding close cases based on the credibility of witnesses' testimony.

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In such cases, the wisdom and experience of an ALJ are far preferable to an artificial tie-breaker such as random selection. Broadcast experience as a tie-breaker is even worse, since it would basically stand for the proposition that the beneficiary of a discriminatory employment marketplace wins in a crunch. A "first filing" criterion is almost as bad, since almost everyone files on the last day to prevent other applicants from stealing their proposals or having the comparative advantage of an early look at their proposals. There is absolutely no evidence that a 5:29 PM window deadline filer is less diligent than an earlier filer. Indeed, the last-filed applicant often used the window period to more thoughtfully develop its proposals.

There has never been a case decided by ALJs which ultimately had to be decided by a tie-breaker system. Thus, the system has worked well. The Commission's ALJs constitute among the few benches in the country utterly bereft of even the hint of a reputation for unfairness or unprofessionalism. They do not need to be reined in with a point system.

On the other hand, it might be useful for the Commission to state, as a general matter, that a "substantial" credit has a weight of approximately a certain amount (eg. 4), a "moderate" credit has a weight of approximately another amount (eg. 2), a "slight" has a weight of approximately another amount (eg. 1) and a "very slight" credit has a weight of approximately another amount (eg. 0.5).

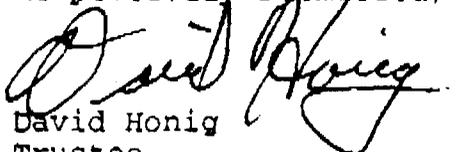
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Judges would then be free, as they do now, to decide that one applicant's substantial civic experience is superior to another's, one applicant's "slight" broadcast experience is superior to another's "slight" broadcast experience, or one applicant's "moderate" diversification demerit is more significant than another's.

CONCLUSION

The Civil Rights Organizations are open-minded on these matters, and urge other parties to the proceeding to discuss with them whether proposals they have submitted can be tailored so as to foster minority ownership.

Respectfully submitted,



David Honig
Trustee
Minority Media Ownership
Litigation Fund
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600

Dennis Courtland Hayes
General Counsel
Everald Thompson
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9193

Eduardo Pena
1101 14th Street N.W.
Suite 610
Washington, D.C. 20005
(202) 371-1555

Counsel for the National Association
for the Advancement of Colored
People and the League of United Latin
American Citizens

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