

**MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL**

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

In the Matter of)
)
Establishment of Rules)
and Policies for the)
Digital Audio Radio)
Satellite Service in)
the 2310-2360 MHz)
Frequency Band)

IB Docket No. 95-91
GEN Docket No. 90-357

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TO THE COMMISSION

**COMMENTS OF THE
MINORITY MEDIA AND
TELECOMMUNICATIONS
COUNCIL**

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The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the NPRM, FCC 95-229 (released June 15, 1995). We support policies which would dramatically enhance the opportunities of minorities to participate in the ownership and programming of DAR facilities.^{1/}

I. If DAR Is Authorized, It Should Be Licensed To A Racially Diverse Set Of Licensees

A. The Commission Should Be Alarmed At The Prospect That Only Whites Would Operate DAR Facilities. The Current Applicants' Licensing Expectancies Are Far Less Worthy Of Protection Than The Commission's Minority Ownership Policies.

The Commission invited applicants for satellite DAR licenses before it even adopted its rules. The only applicants were those whose capital-formation strengths permitted them to prepare and prosecute applicants even in the absence of firm ground rules. Given minorities' well known difficulties with capital formation,^{2/} it's not surprising that, faced with the absence of rules, no minorities applied.

Certainly the current applicants have some moral expectation that their efforts will be acknowledged in some way. But as the Commission's experience with IVDS illustrates, applicants always proceed at their own risk and have neither legal nor equitable rights to any particular relief.

Whatever preferences the four current applicants might expect, the Commission's bedrock policies must take precedence. As between the private, non-legal expectations of four applicants and the Commission's duty to promote diversity of ownership, the choice is

^{2/} See NTIA, "Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries," April, 1995, at 14-16.

not a close one, whether there are auctions, comparative hearings or lotteries. The current applicants might be entitled to some modest advantage akin to a "finder's preference", but this should not trump any preferences which might be available for minority^{3/} or small business status.

Opportunities for inclusion of everyone with talent in an industry whose business in the creation and distribution of talent is sound economic policy, even if the business is regulated primarily as a common carrier.^{4/} Minority opportunity will strengthen the economic base of this new industry in two ways. First, these invigorated facilities will create jobs which would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace. Second, new facilities owned by minorities and reaching heretofore underserved minority audiences will have a net positive effect on the ability of advertisers to reach the public.

B. To Foster Minority Ownership, The Commission Should Either Start Fresh With Comparative Hearings Or Hold An Auction With Substantial Minority-Sensitive Bidding Credits.

MMTC opposes lotteries. A lottery is nothing more than a private auction, yielding nothing to the government and little to

^{3/} It is time for the Commission to acknowledge that its minority ownership and EEO programs are not only desirable instruments to promote diversity, they are compelled by the Equal Protection Clause of the 14th Amendment and the Due Process Clauses of the 14th and 5th amendments. These programs -- and much more -- are needed in order to compensate for a very long history of official actions which deprived minorities of any meaningful access to the radiofrequency spectrum -- a vast and valuable public resource which, for two generations, the FCC gave away for free to Whites only. See generally MMTC's Comments in MM Dockets 94-149 and 91-140 (Minority and Female Ownership of Mass Media Facilities), filed May 17, 1995, and incorporated herein by reference.

^{4/} See infra at 3-4.

the public. While lotteries have often produced high numbers of minority winners, these winners have obviously tended to be less highly motivated or long-lasting in business than minority auction winners or comparative hearing winners.

From the standpoint of fostering minority ownership, it is not clearly evident whether comparative hearings or auctions is the more desirable approach. MMTC favors an explicit minority preference under either approach, but if that's not possible at this time, MMTC urges the Commission to issue licenses using race-neutral factors correlating highly with minority status and offering strong public interest value in their own right -- e.g., business size, absence of other attributable media or telecommunications interests, and civic involvement. In particular, a firm commitment to lease channels to minority owned companies should be a substantial factor in either auction or comparative hearing criteria.

In addition, to avoid any unnecessary adverse impact on minority applicants, the Commission should avoid imposing any requirement akin to "broadcast experience"^{5/} or any unnecessarily stringent financial qualifications standards.

II. DAR Should Be Regulated Primarily As A Common Carrier, With Appropriate Public Interest Protections

A. Each Licensee Should Set Aside One Channel For Noncommercial Public Access And One Channel For Minority Entrepreneurial Access.

Even if the procedures suggested in §I of these Comments are followed, it is still likely that few, if any, DAR licensees will be minority owned. Therefore, the most effective way to promote

^{5/} See 1965 Policy Statement, 1 FCC Rcd 393, 396 (1965) ("since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, it will be deemed of minor significance.")

program diversity would be to regulate DAR primarily as a common carrier, building in protections to insure that needs not addressible through the common carrier marketplace are fulfilled through this important new service.^{6/} It can do this by requiring licensees to set aside one channel for noncommercial public access and another channel for minority entrepreneurial access.^{7/}

B. The Commission Should Enforce A Strict, One To A Customer, Multiple Ownership Rule.

Once a multiple ownership rule is waived, its benefits can never be regained. Grandfathering and concentration last forever, while the half-lives of diversity and competition are all too short.

The best that the Commission is likely to be able to say in adopting prospective rules for a new service is that it cannot venture an intelligent guess whether the optimum degree of diversification will obtain in practice.

Whenever the Commission has relaxed its multiple ownership rules, it has done so only based on past experience. Here, the Commission has no past experience. Thus, it should apply a strict one-to-a-customer rule, thereby giving the consumer the greatest possible choice of services, the greatest degree of program diversity, and the most competitive prices.^{8/} Any relaxation of the

^{6/} Today's Comments by Media Access Project ("MAP") urge the regulation of DAR as a broadcaster because DAR will use public's spectrum. MMTC respectfully disagrees; common carriers also use the public spectrum. A common carrier would have to include minority lessees on demand, while a broadcaster could exclude minorities entirely with little fear of FCC oversight. But MMTC firmly agrees with MAP that irrespective of how DAR is regulated, DAR is so broadcast-like that public interest protections must be built into the regulatory structure from DAR's inception.

^{7/} This proposal assumes that each licensee will have at least 20 channels.

^{8/} Certainly if an selectee fails to implement its proposal, its spectrum should not be made available exclusively to the other selectees. See NPRM at 11 ¶32. Fortuity is no substitute for the public interest.

multiple ownership rules should come only when, and if, practical experience suggests that relaxation is necessary if the service is to survive.

C. **Licensees Must Provide Equal Employment Opportunity.**

EEO compliance is essential in the development of a new service. Diversity from the inception of the service obviates the need for years of tortuous struggle to achieve diversity through such inefficient and emotionally charged means as the replacement of vested incumbent employees. The Commission is only too well aware of how difficult it has been to reverse decades of unequal opportunity in its terrestrial broadcasting, cable and common carrier services.

Irrespective of whether a broadcast, common carrier or hybrid regulatory model is employed, licensees should be expected to provide aggressive equal employment opportunity, including targeted recruitment. Diversity is promoted directly through broadcast EEO.^{2/} It is promoted almost as directly through a common carrier whose business is the provision of information and entertainment content to the public, because persons engaged in the delivery of the information are likely to possess or learn those skills which are transferrable to the task of creating and packaging that information.

^{2/} See NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Honig", written in a cursive style.

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