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January 28, 1999

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JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex parte* Submission in Broadcast Television National Ownership Rules, MM Docket Nos. 96-222, 91-221, 87-8; Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket Nos. 91-221, 87-7; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, MM Docket Nos. 94-150, 92-51, 87-154

Dear Ms. Salas:

On January 27, 1999, Steve Hillard, President of Council Tree Communications, L.L.C., submitted the attached documents to Mr. Roy Stewart regarding the above referenced proceedings. The attached submissions discuss a number of issues regarding the applicability of the Commission's designated entity principles to the television ownership broadcast rules.

Pursuant to Section 1.1206 of the Commission's Rules, this letter and two copies of the written presentation per each of the above-referenced dockets are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Gonzalo de Dios

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COUNCIL TREE COMMUNICATIONS, L.L.C.

2919 West 17th Avenue, Suite 211
Longmont, Colorado 80503

January 27, 1999

Roy J. Stewart
Federal Communications Commission
Chief, Mass Media Bureau
1919 M Street, Room 314
Washington, DC 20554

Dear Roy:

As a followup to our discussion last week, attached is the following:

(a) A suggested program to deal with the television LMAs/duopoly issues under the concept of a "designated entity/new entrant" program pursuant to the policy directives of §309(j).

(b) A legal memo confirming the authority of the Commission to utilize §309(j) to inform its judgments regarding the television ownership rules.

I hope the above is responsive and look forward to following up with you. We would be pleased to work with your office in developing a full mark-up of the DE Rules to create a fully-developed proposal.

Very truly yours,

Steve Hillard
President

Attachments

Telephone: (303) 678-1844; Fax: (303) 678-1859

CONCEPT OUTLINE

DE PROGRAM FOR SOLVING TV LMAs/DUOPOLY ISSUES

Purpose:

- To define a program that fairly addresses the investments in existing LMAs while meeting the goal of achieving diversity of ownership on a constitutionally-acceptable basis.

The Existing LMA's:

- Limited Grandfathering:
  - Up to [eight] per TV group operator
  - LMA's may continue to operate only for their current existing contract terms (maximum of [six] years from date of LMA)
  - However, any ultimate ownership interests must comply with the Limited DE Attribution Exception (see below)

- Note regarding "Industry Fund" concept:
  - May be politically difficult
  - Industry probably not cohesive enough
  - Fund size may be perceived as too small
  - Should have a neutral administration

Going Forward Rules:

- Transition to Limited Duopoly Relief:
  - The television industry needs some phased-in duopoly relief to achieve the efficiencies that will allow it to compete against other media.
  - The best way to phase this in is with a pro-diversity program.

- The Program: Limited DE Attribution Exception:
  - Borrow best parts of Commission's existing Designated Entity (DE) program under §309(j)
  - Develop certain "bright line" tests to reduce the need for using Commission staff resources.
  - Basic DE Rules:
    - A current station owner can have non-attributable interest in a qualified DE-owned station
      - Example: TV station owner can have up to 49.9% non-attributable equity interest in qualified DE station so long as DE retains de jure and de facto control
    - DE Affiliation rules – extensive; designed to prevent shams

- No-Flip Rules – DE can't transfer its interest to non-DE for 3-5 years
- Race and Gender Neutral (i.e. a small business concept)

- Additional changes to DE Rules:
  - New Entrant: DE must be New Entrant:
    - Not have had 10% or greater interest in any television station or group within past eight years.

  - Limit on DE Stations: No DE and no industry partner can have more than 6 stations under this program.

  - Limited Joint Operations: The DE can combine certain aspects of operations with any other station: e.g. physical facilities and back office functions.

  - "1 to Market Rule" for the DE and for any partner with a DE.

  - No VHF/VHF combinations

  - Penalty for breach of DE Rules: license revocation

- Additional Benefits for Minority and/or Gender-Qualified DE's:
  - Subject to results of Commission's current Adarand studies, the Commission should reserve the possibility of additional benefits for minority and women-controlled DE's:
    - Ownership cap relief
    - VHF/VHF combinations in certain markets
    - Additional 4 stations under Limited DE Attribution Exception

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MEMORANDUM

January 26, 1999

TO: Council Tree Communications

FROM: Coudert Brothers

RE: Applying the Principles of Section 309(j) to Broadcast Ownership Policies

The Telecommunications Act of 1996 directed the Federal Communications Commission ("Commission") to undertake significant and far-reaching revisions to its broadcast media ownership rules.[1] Throughout its re-evaluation of the ownership rules, the Commission has demonstrated an acute awareness of the need to promote the goal of diversity.[2] The purpose of this memorandum is to provide a legal and policy analysis of how the principles and objectives of Section 309(j) of the Communications Act, as amended,[3] which promote a diverse pool of participants in spectrum-based services, dovetail with the broadcast ownership diversity policies. It also supports the argument that the Commission should further diversity of ownership in television broadcast stations by adopting various preferences for "designated entities" in its ownership rules, much as it has done in the context of its competitive bidding rules.

I. Diversity of Ownership in TV Broadcast Stations — A Primary Objective of Broadcast Licensing Serving First Amendment Principles

Increasing diversity in programming constitutes a cornerstone of broadcast regulation. The Commission's policies promoting program diversity are based, in part, on the First Amendment principle that a "diversity of voices" serves the public interest.[4] Holding that diversity is a primary objective in its licensing scheme, the Commission stated:

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[1] Pub. L. No. 104-104, § 202 (1996).

[2] Diversity has been referred to in many different contexts, including diversity of views or voices, and diversity of ownership. We will discuss both of these concepts in this memorandum.

[3] 47 U.S.C. § 151 *et seq.*

[4] *See Associated Press v. United States*, 326 U.S. 1, 20 (1944) (stating that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

> That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established.[5]

Various Commission regulations have been adopted in order to diversify program selection to some extent. Such regulations range from the more content-oriented provisions[6] to those that promote diversity of programming through diversity of outlets and sources. The concept of increasing diversity of programming by increasing diversity in programming outlets and sources is based on the theory that changing the identity of the programmer broadens the mix of broadcasts the programmer otherwise would choose.[7]

For decades, minority ownership of broadcast facilities has been encouraged by the Commission under the theory that minority background would influence programming and hence add to the mix of voices. The Commission established some of its first policies regarding minority ownership of broadcast facilities in 1978, when it did the following: (1) endorsed preferences to minority applicants in comparative hearings when the minority owner participated actively in day-to-day management;[8] (2) announced a "distress sale" policy, such that a broadcaster facing a hearing and expecting loss of a license could avoid the hearing (and probably loss of the license) by selling

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[5] Policy Statement on Comparative Broadcast Hearings, Public Notice, 1 FCC 2d 393, n.4 (1965) ("Comparative Hearings Policy Statement").

[6] For example, the "fairness doctrine," required stations to inform their viewers and listeners about the major issues of the day in a roughly balanced manner. *See Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367 (1969). This doctrine was eventually repealed by the Commission. Complaint of Syracuse Peace Council, Memorandum Opinion and Order, 2 FCC Rcd 5043 (1987). The "equal time" provisions, mandated by the Communications Act, provide that if a broadcaster allows one political candidate to gain airtime, the broadcaster must allow the candidate's opponents a like opportunity. 47 U.S.C. § 315. Children's educational programming also is required. In the Matter of Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broadcast Stations, Report and Order, 11 FCC Rcd 10660 (1996).

[7] Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcasting Programming 85 (1994). *See also TV 9, Inc. v. Federal Communications Comm'n*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974) ("it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news").

[8] Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 982 (1978) ("Minority Ownership Policy"). "Minority" was defined for the purposes of that proceeding as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Id. at 980, n.8.

its station for up to 75% of its fair market value to a minority-controlled group;[9] and (3) offered tax certificates allowing a deferral of capital gains to broadcasters who sold to minority groups.[10]

All of these policies have since been eliminated. The Commission's tax certificate program was ultimately removed by legislative action.[11] Although the Commission's minority preferences in comparative hearings and distress sale policy were upheld by the U.S. Supreme Court in *Metro Broadcasting v. Federal Communications Comm'n*,[12] in 1994, the Commission ultimately stayed all pending comparative licensing cases after the U.S. Court of Appeals for the D.C. Circuit struck down certain criteria used in the process.[13] This stay was recently eliminated when the Commission implemented auction procedures for broadcast licenses.[14]

Judicial and congressional action also changed the landscape for the viability of minority preferences. First, the U.S. Supreme Court "overruled" *Metro Broadcasting* in *Adarand Constructors, Inc. v. Pena*.[15] In that case, the Supreme Court struck down a federal program that provided preferences to racial minorities bidding on public works projects and determined that racial classifications must survive strict scrutiny, rather than the intermediate scrutiny applied in *Metro Broadcasting*.[16] As a result of the *Adarand* case, the Commission's preferences for minority broadcasters, as well as all other minority-based rules implemented by the Commission, required reevaluation to determine whether they would be upheld under this new constitutional standard. The Commission has acknowledged that, for most of its minority- and gender-based regulations, additional studies are required in order to determine whether there is sufficient evidence supporting race- and gender-based measures under the strict scrutiny standard of *Adarand*.[17] Second, Congress

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[9] Id. at 983.

[10] Id. at 982-983.

[11] The applicable law allowing tax certificates was eliminated in 1995. Hence, tax certificates no longer apply to sales and exchanges on or after January 17, 1995. Act of Apr. 11, 1995, Sec. 2, Pub. L. No. 104-7.

[12] 497 U.S. 547 (1990).

[13] *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). "FCC Freezes Comparative Hearings," Public Notice, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

[14] *See infra.*

[15] 515 U.S. 200 (1995).

[16] Id.

[17] The Commission has commenced various studies examining barriers to entry in the wireless and broadcast industries. *See* In the Matter of Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order, 13 FCC Rcd 15920, at n.224 (1998) ("Broadcast Auction Order").

passed the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act to include commercial broadcast applications, thus eliminating the comparative hearing process.[18]

Despite these broad changes, the Commission continued to support the goal of increasing minority ownership of broadcast stations. In the proceeding implementing the Section 309(j) auction procedures, the Commission reiterated its commitment to further its longstanding goal of increasing minority ownership of broadcast stations, to the extent that such steps comply with applicable constitutional standards.[19] In light of the legal uncertainties surrounding minority-based preferences under the *Adarand* case, the Commission fulfilled its statutory[20] and policy objectives of providing opportunities for small, minority- and women-owned businesses, by adopting special measures for applicants with no or few media interests. This so-called "new entrant" preference was deemed to be "the most appropriate way to implement the statutory provisions regarding opportunities for small, minority- and women-owned businesses."[21]

As illustrated above, the Commission has long been committed to promoting diversity in the ownership of broadcast stations and, consequently, minority ownership of broadcast facilities in order to further the goal of a "mix" of voices. The Commission now has an opportunity to revisit the ways in which these important policy goals may be implemented, in light of the recent changes in the legal landscape regarding minority preferences.

II. Diversity of Licensees of Auctionable Spectrum — An Objective of Section 309(j).

Although the notion of diversity of licensees is well ensconced in broadcasting law, this multi-faceted concept has more recently been adopted in the Commission's policies governing competitive bidding. Section 309(j) of the Communications Act gives the Commission authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses.[22] Several sections of this statutory provision concern participation in the competitive bidding process by small businesses, rural telephone companies, and businesses owned by women

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[18] Pub. L. No. 105-33, 111 Stat. 251 (1997).

[19] In the Matter of Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, ¶ 87 (1997).

[20] As discussed *infra*, Section 309(j) imposes certain obligations on the Commission regarding the provision of opportunities for small, minority- and women-owned businesses.

[21] Broadcast Auction Order at ¶ 189.

[22] 47 U.S.C. § 309(j)(1).

and minorities (known collectively as "designated entities"). Specifically, Section 309(j)(4)(D) requires the Commission to prescribe competitive bidding regulations that

> ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . . .[23]

Section 309(j)(3)(B) further states that, in establishing eligibility criteria and bidding methodologies, the Commission must promote the objectives of "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[24]

To further these Congressional objectives, the Commission has adopted a number of measures in its various auction rules. For example, the Commission adopted installment payment plans for small businesses, including those owned by minorities and females. By allowing designated entities to pay for their licenses won at auction in installments, the Commission hoped to address the inability of designated entities to obtain financing and enable them to compete more effectively for auctioned spectrum.[25] The Commission also adopted bidding credits, which allowed designated entities to receive a payment discount (or credit) for their winning bid. The bidding credit is essentially a payment discount, again intended to address the problem of access to capital that many small businesses and minority- and women-owned businesses face.[26] Finally, the Commission adopted "spectrum set-asides." Under this concept, spectrum would be set aside specifically for bidding by particular entities, such as designated entities. The Commission noted that spectrum set-asides may be needed to ensure designated entities the opportunity to participate in spectrum-based services.[27] The Commission eventually implemented its spectrum set-aside concept in the Personal Communications Services ("PCS") auctions, by designating two frequency blocks allocated for broadband PCS -- the C and F blocks -- solely to bids by individuals and entities under a certain

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[23] 47 U.S.C. § 309(j)(4)(D).

[24] 47 U.S.C. § 309(j)(3)(B).

[25] In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, ¶ 232 (1994) ("Auction Second Report and Order").

[26] Id. at ¶ 241.

[27] Id. at ¶ 247.

financial size, with special provisions for businesses owned by members of minority groups or women.[28]

As a result of the *Adarand* decision, the Commission modified its designated entity measures to be race- and gender-neutral. The Commission, however, stated that it remained committed to the mandates and objectives of Section 309(j) as they applied to designated entities.[29] Thus, the Commission modified its rules to allow small businesses to benefit from bidding credits and installment payment plans, assuming that many minority and women-owned businesses would qualify as small businesses and benefit from such provisions.[30]

After gaining valuable experience with the initial PCS auction process, the Commission continued to modify its competitive bidding rules as they apply to designated entities. In its rulemaking establishing general competitive bidding rules for all auctionable services,[31] the Commission suspended the use of installment payments in 1997, due to findings that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate in the auction program, and due to issues involving past bankruptcy litigation and difficulties in reclaiming licenses quickly should a licensee declare bankruptcy.[32] Instead, the Commission relied on bidding credits as the primary method for ensuring dissemination of licenses among designated entities.[33]

Throughout the evolution of the competitive bidding rules, the Commission has remained committed to furthering the objectives of Section 309(j). The Commission has in fact tentatively concluded that "to the extent consistent with constitutional standards, we should take

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[28] In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

[29] Id. at ¶¶ 118-29.

[30] In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, at ¶ 11 (1995) ("PCS Sixth Report and Order"). The Commission specifically found evidence that minority and women-owned businesses would qualify as small businesses. Id.

[31] In its initial Order adopting general guidelines for its competitive bidding rules, the Commission stated that it would adopt auction rules for each auctionable service or class of service. Since that time, the Commission has completed more than 15 spectrum auctions and adopted service-specific competitive bidding rules for each. The proceeding adopting generic competitive bidding rules was intended to simplify and streamline the rulemaking process.

[32] In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, ¶ 38-39 (1997) ("Part 1 Order").

[33] Id. at ¶ 41.

steps to further our statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum-based services pursuant to Section 309(j)(4)."[34]

III. Applying the Principles of Section 309(j) to Further Diversity of Ownership in TV Broadcast Stations

Section 309(j) and the Commission's policies governing broadcast ownership further similar goals and objectives: diversifying the pool of participants in spectrum-based services and encouraging minority participation in such services. Just as the Commission's broadcast policies promote diversity of voices through diversity of ownership and other means, the mandates of Section 309(j) promote diversity of licensees participating in spectrum-based services.

In fact, the Commission has recognized that the means used to fulfill the statutory goals of Section 309(j) related to designated entities, also could be used to increase diversity of ownership in the broadcast industry.[35] In its proceeding establishing rules to auction broadcast spectrum, the Commission specifically recognized that the tools used to promote the goals of Section 309(j), such as bidding credits and other designated entity preferences, might be helpful in promoting diversification of ownership as well.[36] Indeed, the concepts of licensing through competitive bidding and broadcast station ownership, as well as the goals that they respectively promote, are inextricably linked. Competitive bidding is merely a method for disseminating licenses which, in turn, determines station ownership. Preferences or restrictions on certain entities that participate in the competitive bidding process help to determine the ultimate owners of broadcast stations just as the Commission's more traditional ownership regulations help to shape the variety of ownership structures and, hence, variety of voices, that may emerge. The Commission also has broad authority, and responsibility, to define the next generation of television ownership rules in a manner consistent with the public interest.[37] The Commission's public interest analysis should be informed by, among other things, the views of Congress regarding diversity in television ownership. That view is clear:

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[34] Id. at ¶ 174.

[35] The term "designated entity" typically refers to small businesses, rural telephone companies, and businesses owned by members of minority groups and women. *See* 47 U.S.C. § 309(j)(4)(D). For purposes of this memorandum, however, the term "designated entity" will not include rural telephone companies seeing as the measures discussed herein are largely inapplicable to those entities. *See* Broadcast Auction Order at ¶ 191 (determining that additional measures for rural telephone companies are unnecessary in broadcast auctions).

[36] Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, ¶ 92 (1997).

[37] *See, e.g.*, 47 U.S.C. §§ 151, 303, 309(a).

> avoiding excessive concentration of licenses and . . . disseminating licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women.[38]

Given the undeniable nexus between the competitive bidding and station ownership regulations — both of which are a means for determining station ownership — the Commission could be seen as being remiss in its policy making duties if it promoted the policies of Section 309(j) in one aspect of the licensing process (*i.e.*, the competitive bidding process) and denied those same policies in another aspect of this process (*i.e.*, ownership regulation).

Accordingly, as the Commission undertakes its comprehensive review of the television ownership rules, it could properly take this opportunity to further its goal of diversity of ownership by adopting various television ownership preferences for certain entities described under Section 309(j) that would represent new voices in a community. One particularly suitable way to promote this diversity objective would be to adopt, in pertinent part, the Commission's already existing designated entity rules as a means of defining eligibility for benefits and attribution standards in the television ownership context.[39] These rules are currently race and gender neutral,[40] and have been subject to exhaustive public comment, reviewed by the courts,[41] and utilized extensively by the Commission.[42]

Designated entity rules applied in the broadcast ownership context could exempt a designated entity-controlled broadcast entity from being considered an "attributable interest" for purposes of the following: (1) the national ownership rule, which limits the aggregate ownership interests in television stations to those which reach a maximum of 35% of the national audience; (2) the duopoly rule, which precludes a television licensee from owning more than one television station in the same community; and (3) the one-to-a-market rule, which prohibits a broadcast licensee from owning, operating, or controlling more than one broadcast station in the same area, regardless of the

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[38] 47 U.S.C. § 309(j)(3)(B).

[39] *See* 47 C.F.R. § 24.709 (eligibility and attribution rules for participation in PCS C and F Block auctions).

[40] PCS Sixth Report and Order (adopting race- and gender-neutral rules for the PCS C Block auction); In the Matter of Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, FCC 96-278, Report and Order (rel. June 24, 1996) (adopting race- and gender-neutral rules for the PCS F Block auction).

[41] *Omnipoint Corp. v. Federal Communication Comm'n*, 78 F.3d 620 (D.C. Cir. 1996).

[42] To date, the Commission has completed more than 15 spectrum auctions, a majority of which contain rules involving designated entity provisions.

type of service involved (*i.e.*, radio or television).[43] The Commission could fully or partially exempt entities that fall under the umbrella of Section 309(j) (*i.e.*, designated entities) from any rules that attribute interests owned by a designated entity to an investor's other ownership interests.

Such preferences are consistent with the methodologies implemented pursuant to Section 309(j). Similar to the bidding credits and installment payments adopted in the competitive bidding context, such rules would address the financial barriers that designated entities face when entering a capital intensive industry such as broadcasting. Allowing special benefits for investing with designated entities would ensure that those entities have the opportunity to compete in an industry that is quickly becoming characterized by consolidation and declining diversity, especially participation by minorities.[44]

As part of its review of the television broadcast ownership regulations, the Commission would be on solid ground in adopting a set of designated entity rules. Use of a designated entity concept would encourage diversity of ownership because the arrangements could provide one or more benefits that would attract capital to the designated entity. Studies have shown that access to and cost of capital is the single most significant barrier to entry for small, minority- and women-owned businesses in the telecommunications industry. [45]

Designated entity provisions also could ensure that a "diversity of voices" would be maintained. The Commission's rules could require the designated entity licensee to maintain editorial control over programming and responsibility for the overall operation of the station. Thus, the station licensee would be required to maintain control over programming content, as well as *de jure* and *de facto* control under the more broad-based ownership rules.

We understand that the Commission may feel restricted from establishing race- or gender-based preferences in light of the uncertainties raised by the *Adarand* decision, and that further studies examining barriers to entry faced by minority- and women-owned businesses may be required to be completed before final rules are adopted. We believe, however, that initially, such ownership interests may be promoted in the same manner in which the Commission promoted the goals of

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[43] *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making, 11 FCC Rcd 19895, ¶¶ 26-31 (1996); Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, 11 FCC Rcd 21655, ¶¶ 80-91 (1996); Broadcast Television National Ownership Rules, Notice of Proposed Rule Making, 11 FCC Rcd 19949, ¶¶ 25-27 (1996).

[44] Although the number of commercial television stations increased by 16 over the last year, the number of minority-owned commercial television stations decreased by six, from 38 to 32. Moreover, minority ownership of commercial broadcast stations is at a lower level today than it was in 1994 and 1995. National Telecommunications and Information Administration, U.S. Department of Commerce, Minority Commercial Broadcast Ownership in the United States Section I.a. (1998).

[45] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, 12 FCC Rcd 16802, ¶ 215 (1997).

Section 309(j) in its auction procedures. That is, given that a majority of minority- and women-owned businesses would qualify as "small businesses," the Commission could adopt an interim exemption provision based on financial size. This type of exemption would not implicate the *Adarand* standard and would encourage minority-owned licensees to participate in broadcast services. Once the Commission has completed the relevant studies to gather sufficient evidence supporting race- and gender-based measures under the *Adarand* standard, the Commission could then take additional steps toward adopting provisions that more directly benefit minorities and women.

The Commission is faced with a daunting task. On the one hand, it must ensure that its rules and regulations are consistent with the constitutional requirements governing race and gender-based provisions. On the other hand, it must fulfill its public interest obligations to increase diversity and encourage minority ownership. Thus far, some could argue that Congress and the Commission have tipped the scales against diversity and minority entities by eliminating virtually all of the provisions encouraging minority participation in the broadcast industry. Pursuant to the imprimatur of designated entity policies under Section 309(j), the Commission clearly has the authority to now reverse that trend by revising the television ownership rules to include designated entity provisions.