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Hon. Magalie Roman Salas
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Federal Communications Commission
445 12th St. S.W.
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MAY 24 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

RE: RM-9567 (Amendment of Section 73.3598 of
The Commission's Rules --Entravision
Holdings LLC Petition for Rulemaking)

On behalf of the Minority Media and
Telecommunications Council, the Rainbow/PUSH
Coalition and the League of United Latin American
Citizens, transmitted herewith are ten copies of
our Comments.

Respectfully submitted,


David Earl Honig
Counsel for MMTC et al.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:

Amendment of Section 73.3598 of)
The Commission's Rules --) RM-9567
Entravision Holdings LLC Petition)
for Rulemaking)

To The Commission

RECEIVED

MAY 24 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**COMMENTS OF THE MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, THE
RAINBOW/PUSH COALITION AND THE LEAGUE
OF UNITED LATIN AMERICAN CITIZENS**

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SUMMARY AND INTRODUCTION

The Minority Media and Telecommunications Council, the League of United Latin American Citizens and the Rainbow/PUSH Coalition (collectively "MMTC") respectfully submit these Comments generally supporting the Petition for Rulemaking filed by Entravision Holdings, LLC ("Entravision") concerning revision of the construction permit expiration standard established pursuant to §§319(a)-(b) of the Act. See 47 CFR §73.3598.

Entravision has proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign language groups for at least 80% of their operating time.^{1/} Entravision's proposal is derived from the 1998 modification of 47 CFR §73.3598, in which the Commission created a single three year term for construction permits and provided for their automatic forfeiture upon the expiration of their term unless the cause of delay is an Act of God or the subject of an administrative or judicial review.^{2/}

MMTC generally supports Entravision's proposal. We do suggest some specifications for determining minority ownership or control that differ from those proposed by Entravision. We also believe that Entravision's proposed

1/ See Petition for Rulemaking of Entravision, appendix, at 8 (hereinafter the "Entravision proposal")

2/ See In the Matter of 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules and Processes, MM Docket No. 98-43, 94-149, 13 FCC Rcd 23056 ¶¶83-85 (1998).

programming content requirement is unnecessary.

With the revisions suggested herein, Entravision's proposal would advance the goal of programming diversity, and would do so in a constitutionally permissible way. Like the distress sale policy, Entravision's proposal does not deprive nonminorities of a benefit which they have any expectation of receiving. Indeed, the proposal would substantially benefit nonminority sellers, minority buyers and the general public. Entravision's concept is a "win-win" because it would put expiring permits to their most efficient use while promoting the public interest.

I. Why The Commission Should Adopt The Entravision Proposal

A. The Commission Seeks Ways To Increase Minority Participation And Ownership

The Entravision proposal is consistent with the Commission's long-standing policy of fostering minority ownership of broadcasting facilities. Minority ownership is a "significant way of fostering the inclusion of minority views in the area of programming."^{3/}

The Commission has undertaken several initiatives to increase opportunities for entry and expansion into the broadcasting field by minorities. One of these, the distress sale policy^{4/} (discussed at 17 *infra*), is especially useful because it simultaneously targets minorities' lack of transactional opportunities and lack of access to capital.

^{3/} Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 981 (1978) ("Minority Ownership Policy Statement").

^{4/} See id. at n. 1.

The distress sale policy, as well as the simultaneously-adopted tax certificate policy, focused directly on boosting incentives to providing capital and support to minority owned enterprises.^{5/} These policies provided incentives for increased minority participation and reduced barriers to entry caused by discrimination in the marketplace. The policies achieved their objectives by fostering price discounts responsive to minorities' lack of access to capital and by providing an incentive for nonminorities to sell stations to minorities.^{6/} These and other regulatory directives underscore the value of new, innovative approaches to minority ownership.^{7/}

B. The Commission Has the Requisite Statutory Authority To Implement The Proposal

Because the Entravision proposal will increase minority ownership and programming diversity, it satisfies several objectives which Congress has explicitly authorized the Commission to implement. Thus, the Commission is authorized to adopt the proposal.

5/ See Minority Ownership Policy Statement, 68 FCC2d at 983; 26 U.S.C. §1071, repealed 1995.

6/ See Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) ("1982 Policy Statement").

7/ See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services); see also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 11 FCC Rcd 6280 (1996) ("Section 257 Proceeding") (implementing Section 257 of the Act, which directs the Commission to promote the policies and purposes of the act favoring diversity of media voices, vigorous economic competition and technological advancement.)

The umbrella public interest standard encompasses the promotion of minority ownership.^{8/} The Commission has traditionally interpreted the public interest standard as including the right to receive diverse views on issues of public importance.^{9/} By extension, the right to receive diverse information is advanced by access to the medium by owners from diverse communities.^{10/}

The courts have long recognized that "black ownership and participation together are likely to bring programming that is responsive to the needs of black citizenry."^{11/} The Commission has consistently agreed with this obvious but

^{8/} 47 U.S.C. §151 (1996); 47 U.S.C. §303 (1934).

^{9/} 1982 Policy Statement, 92 FCC2d at 849 ¶1. This interpretation is consistent with the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), which confirmed that the public interest standard was driven by the consumer's right to receive a wide spectrum of viewpoints on issues of public importance.

^{10/} See Policy Statement on Comparative Broadcasting Hearings, 1 FCC2d 393 (1965) (maximum diffusion of control of the media of mass communications, generally referred to as diversification, promotes diversity of programming); Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765 ("...it is upon ownership that public policy places primary reliance with respect to diversification of content and that historically has proved significantly influential with respect to editorial comment and presentation of news") (citing TV 9 v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973)).

^{11/} Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975).

fundamental principle.^{12/} The Supreme Court also recognized the legitimacy of these objectives in Metro Broadcasting, Inc. v. FCC, wherein it stated that racial diversity in ownership was an important governmental objective.^{13/}

The umbrella requirement of the public interest standard clearly encompasses the right of access to ownership by minorities.^{14/} The Entravision proposal provides the Commission with yet another tool to achieve this objective.

Aside from the general public interest requirement, Congress has periodically revisited the issue of minority ownership and participation and enacted specific provisions requiring the Commission to issue regulations to address the problem. Congress enacted these statutes because it recognized that "despite the existence of regulations governing equal employment opportunity, women and minorities [were] still significantly under-represented as employees and

^{12/} See, e.g., Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788 (1995) ("Minority Ownership NPRM") (stating that it desired to provide "minorities and women [a chance] to learn the operating and management skills necessary to become media owners and entrepreneurs.")

^{13/} 497 U.S. 547, 567 (1990) ("Metro Broadcasting"). See also NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) (EEO rules justified to promote diversity in program service).

^{14/} Congress has consistently affirmed the Commission's goal of promoting minority ownership. See, e.g., Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102nd Cong. 2d Sess. 1992, at 60; 47 U.S.C. §151 (revised in 1996 to explicitly require that licensing and regulation occur "...without discrimination on the basis of race, color, religion, national origin, or sex.")

owners in the [cable, television, and radio] industries."^{15/}

A review of the legislative history of one of these initiatives, Section 309(i)(A)(3), reflects Congress' intent to "increase the number of media outlets owned by underrepresented persons or groups."^{16/} Congress provided the Commission some discretion and autonomy in use of lotteries when awarding licenses and placed emphasis on diversifying media ownership.^{17/} When Section 309(i)(A)(3) was repealed in favor of auctions, Congress again reiterated that minority ownership was an important objective.^{18/}

Thus, minority ownership has been an ongoing concern of Congress, and the Commission's implementing regulations have a sound basis in this legislative mandate. Congress has empowered the Commission to promote minority ownership and programming diversity. Because the Entravision proposal will advance these objectives, the proposal is well within the scope of the Commission's authority under the Act.

^{15/} Pub. L. 102-628, 271-272 (citing H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) at 85).

^{16/} 47 U.S.C. 309(i)(A)(3) ("for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including...business owned by members of minority groups, and women."); see also, H.R. Conf. Rep. 97-765, at 7.

^{17/} H.R. Conf. Rep. 97-765, at 21-23.

^{18/} Section 309(j) requires the Commission to ensure that competitive bidding rules provide small businesses, businesses owned by minorities and women, and rural telephone companies an opportunity to participate in the "growing wireless communications industry."

**C. The Proposal Fills An Important
Need For Creative Methods Of
Increasing Minority Participation**

The Entravision proposal is timely because of an increased need for creative vehicles to increase minority participation and ownership opportunities in the broadcasting industry. The representation of minorities among broadcast station or cable owners remains far below their presence in the national population and civilian labor force.^{19/} As of June, 1998, only 2.9% of the commercial radio and television stations in operation were minority owned.^{20/} Minorities face barriers in obtaining entrepreneurial and management skills, difficulties in raising capital, and opportunities to bid on broadcast properties -- all directly related to discriminatory treatment.^{21/}

Yet after Adarand v. Peña,^{22/} the only remaining minority ownership policy is the very rarely used distress sale policy.^{23/} The absence of these initiatives has profoundly undermined programming diversity. More than ever, we need new programs to promote minority ownership.

^{19/} See Minority Ownership NPRM, 10 FCC Rcd at 2789 ¶5.

^{20/} U.S. Department of Commerce, National Telecommunications and Information Administration, "Minority Commercial Broadcast Ownership in the United States" (1998).

^{21/} See Comments of MMTC et al. in MM Docket No. 98-204 (Broadcast and Cable EEO) (Volume I, filed March 5, 1999) at 97-133.

^{22/} 515 U.S. 200 (1995) ("Adarand").

^{23/} The only distress sale since 1990 occurred in 1997. It involved a very small station in the California desert, which sold for \$50,000. Desert Broadcasting Co. (MO&O), (MM Docket No. 96-221), Chief, MMB (released June 18, 1997) (on file with counsel) ("Desert Broadcasting").

D. The Proposal Presents An Efficient And Cost Effective Use Of Expiring Permits

The Entravision proposal is a far superior market mechanism for disposing of expiring permits than the current plan for automatic expiration. The proposal allows the Commission to quickly and efficiently put the permit in the hands of those the Commission has found are likely to promote diversity right now. Allowing minorities to build out these permits is far preferable to allowing the permits to expire, for five reasons:

First, affording minorities a chance to build out the permits would promote diversity, as discussed above. For minorities, the process of applying for a new construction permit is even more risky and time consuming than taking on a partially completed project with an outstanding permit. Moreover, even unsuccessful construction permit applicants must encumber their capital for significant periods of time in order to preserve their financial qualifications to hold the permit. Completing construction on an existing permit would significantly reduce some of the start-up costs and risks that present the most significant barriers to minority entry.

Second, the acquisition of an expiring permit by minorities would effectuate the goals of the comparative hearing process in which many of the permittees originally prevailed. The goals of the comparative hearing process were to promote ownership diversity and viewpoint diversity. Thus, the ultimate acquisition of the permit by a minority company would fulfill the purposes of the original licensing

process. It would ensure that the time and expense incurred by the competing applicants was not in vain.

Third, allowing permittees to sell expiring permits to minorities would give the permittees a well-deserved rescue. A permittee who resisted efforts to sell out and tried, but failed, to build out her permit is hardly a profiteer or a trafficker. It is often inequitable to leave such a permittee with nothing after she has invested heavily, in good faith, in obtaining the permit and beginning construction.

Fourth, the acquisition of an expiring permit by minorities would enhance the likelihood that the public will receive service on an expedited basis. When a permit is unbuilt, the public in the proposed station's service area receives only silence or static on the frequency. Furthermore, the FM and TV separation criteria include an obligation to protect unbuilt facilities as though they were on the air, thereby preventing the expansion of service on the same or adjacent channels in other communities. If the permit were turned in and re-issued, additional time would be wasted without any new service to the public. Moreover, a new permittee would face barriers to success even greater than those faced by the original unsuccessful permittee, because the new permittee would have had to pay an auction price for the spectrum space and then defend herself against petitions to deny from unsuccessful bidders in the auction.

Consequently, there is a strong public interest in identifying a class of white knights who could buy expiring permits, and who are likely to succeed in building them out. Fortunately, minorities are especially likely to succeed in

this endeavor. Compared to other broadcasters, minorities tend to have superior expertise in turnarounds and workouts. Minorities earned this expertise as a result of an accident of de facto spectrum segregation: minorities have often only been offered, or have only able to afford failing or underperforming stations, including dark facilities. Often, these properties succeed only when aimed at specialized (e.g., minority) formats that nonminorities often don't understand or in which they have no interest.

Thus, owing to this accident of broadcast history, there are a fair number of minority white knights who can quickly convert expiring permits into successful broadcast stations. Indeed, because the Entravision proposal capitalizes on skills minorities acquired as a perverse outcome of segregation, the proposal would have the very unusual and desirable attribute of turning the sow's ear of racism into a silk purse of broadcast stewardship.

Fifth, allowing minorities to buy expiring permits would relieve the Commission of the time and expense of letting the frequency for bids again. The administrative cost and expense of reletting a permit is always a burden on the government. Often, the auction payments that could be generated are too small to be worth the trouble to the government. However, while small to the government, auction payments can appear huge from the vantage point of an entrepreneur who must succeed against odds in building out the permit and operating the station.

These considerations make the Entravision proposal particularly attractive. The proposal represents the most cost-effective option for all parties involved -- the permittee, the Commission, the public, and minority entrepreneurs.

II. The Commission Should Revise The Proposal To Clarify The Ownership Prerequisites, Eliminate Content Sensitivity, And Discourage The Creation Of Pass-Through Or Other Fictitious Entities

A. The Ownership Requirement Should Follow The Distress Sale and Multiple Ownership Policies

The Entravision proposal defines a qualified buyer as a party in which minority-group members own at least twenty percent (20%) of the equity and such ownership entitles them to participate in the management and control of the party.^{24/} This provision should be refined to ensure that minorities not only participate in control: they must have control. The Commission should follow its longstanding policies which hold that a 20% equity interest and 51% voting control is the minimum necessary to establish that an entity is covered by the minority ownership policies.^{25/} This standard is a clear and proven model for assigning expiring construction permits.

B. Restrictions On Program Content Are Unnecessary

The proposed rule should not contain a programming format requirement. The Commission has usually preferred to meet its diversity policy objectives through structural,

^{24/} Entravision Petition for Rulemaking at 5.

^{25/} See 1982 Policy Statement, 92 FCC2d at 855 ¶11 (discussing limited partnerships).

rather than content based regulations.^{26/} The Commission's policy was aptly summarized in Citizens' Committee to Save WEFM v. FCC:^{27/}

Our previous opinions and the Commission's actions indicate that the majority of format changes are left to the give and take of the market environment and the business judgment of the licensee. It is only when the format to be discontinued is apparently unique to the area served that a hearing on the public interest must be held. In such cases, the public interest in diversity may outweigh the dangers of government intrusion into the content of programming.

The goals of the Entravision proposal would be better served by the elimination of restrictions on program content. Buyers, particularly those building new facilities at great competitive risk, need maximum flexibility to select programming that will optimize the station's market reach and economic potential. While minority formats often provide service that minorities value quite highly, broadcasters can often promote diversity of voices just as well or better with a nonminority format.^{28/}

^{26/} See, e.g., Primary Jurisdiction Referral of Claims Against Government Defendant Arising From the Inclusion In the NAB Television Code of 'Family Viewing', 95 FCC2d 700 (1983); 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).

^{27/} 506 F.2d 246, 249 (D.C. Cir. 1973). See also Amendment of the Commission's Rules Concerning Program Definitions For Commercial Broadcast Stations, 88 FCC2d 1188, 1193 ¶11 (1982).

^{28/} See, e.g., Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) (recognizing that a minority broadcasters could provide value to nonminority local residents by providing them with minority viewpoints they are unlikely to receive elsewhere.)

Unrestricted programming options would increase the potential for the proposed rule's success by allowing the assignees to be responsive to competition and market needs in structuring their programming.

C. The Rule Should Discourage Trafficking

The inclusion of an anti-trafficking requirement in the Entravision proposal was appropriate. In Bechtel v. FCC ("Bechtel I"), the D.C. Circuit pointed out that it is illogical to put the Commission and competing applicants through a process aimed at promoting diversity when the supposedly diversity-promoting winner could immediately turn around and sell the station to anybody.^{29/}

Without an antitrafficking policy, there is a high incentive for speculation by undeserving recipients. Due to their scarcity relative to demand, FCC licenses are worth far more than the property and equipment they cover and are often transferred repeatedly for profit. The Commission should restrict re-assignment or transfer of these construction permits for five years, or three years where exigent circumstances warrant an exception.

^{29/} In Bechtel I, an applicant challenged the Commission's integration policy (Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, 394 (1965)) as an arbitrary and capricious basis for denying her a license. She was the only owner among four competing applicants who did not propose to integrate ownership and management of the new station. 10 F.3d 875, 877 (D.C. Cir. 1993). The Bechtel I court found the integration preference arbitrary and capricious because the lack of an anti-trafficking policy made it underinclusive and circumventable. The court recognized that a recipient could easily certify that they had no present intent to transfer, wait the required one year holding period, then flip the license without any concern for the qualifications of the transferee. Id. at 879. This completely undermined the Commission's pro-diversity goals.

III. The Entravision Proposal Meets Constitutional Standards for Race-Neutral Government Initiatives

A. Because The Proposed Regulation Does Not Disadvantage Nonminorities, It Is Subject At Most To Intermediate Scrutiny

The Entravision proposal is constitutionally sound. The proposed policy would be available to all current permittees, almost all of whom are nonminorities. On the other hand, it does not deprive nonminorities of a benefit which they have any expectation of receiving, since they have no expectation of buying expiring permits. Based on these factors, and on an important governmental interest in the regulation, the proposal is permissible under the standard for intermediate scrutiny established for classifications that are race conscious, but not race preferential.

Policies which are deemed race-neutral or merely race-conscious without being race-preferential are subject at most to intermediate scrutiny.^{30/} A race-neutral classification exists where there is "no disparate impact as to race in the application of the classification."^{31/} Thus, in Jacobson, a teacher transfer policy under which race formed the basis for granting or denial of transfer requests was race-neutral.^{32/} The policy was designed to achieve a

^{30/} McLaughlin v. Boston School Committee, 938 F.Supp. 1001, 1008 (D. Mass. 1996) ("McLaughlin").

^{31/} Jacobson v. Cincinnati Board of Directors, 961 F. 2d 100, 102 (6th Cir. 1992) ("Jacobson"); see also McLaughlin, 938 F.Supp. at 1008 (program must impact all races equally).

^{32/} Jacobson, 961 F.2d at 102.

"racially integrated faculty throughout the Cincinnati Public School System."^{33/} However, the decision turned on the fact that the policy applied equally to both Black and White teachers.^{34/} If a transfer request would result in disrupting the racial balance at the receiving or transferring school, the school board denied it.^{35/} Consequently, "the mere utilization of race as a factor, together with seniority, school need and subject qualification" was evaluated under intermediate scrutiny.^{36/}

The Entravision proposal fits the Jacobson and McLaughlin standard. Like the program in Jacobson, the policy would serve the interests of both minorities and nonminorities. All permit holders would be eligible; nearly all are nonminorities. Furthermore, the program would be voluntary.

As in Jacobson, the proposed rule would confer the benefit of diversity to all consumers irrespective of their race. The policy (with the modifications proposed herein) would not be restricted to applicants in minority communities or applicants planning specific formats.

Finally, the proposed rule is distinguishable from impermissible race-classifications, such as set-asides, that

^{33/} Id. at 103.

^{34/} Id. at 102.

^{35/} Id.

^{36/} Id. at 103 (citing Kromnick v. School District, 739 F.2d 894 (3d Cir. 1984)).

subject individuals to a disadvantage because of their race.^{37/} Nonminorities under the Entravision proposal cannot assert an invasion of a legally protected interest which is concrete and particularized.^{38/} The Commission's plan for expiring construction permits is automatic termination and, possibly, recapture of the spectrum. Thus, the Entravision proposal would deprive nonminorities of nothing to which they are entitled.

Permitting the sale of expiring permits to anybody would be even less race-conscious. However, this alternative is unworkable because it would completely remove permittees' incentives to build out their facilities in a timely manner. If a permittee knew from the moment it received a permit that it could ultimately sell to anyone in the world rather than build out the permit, it would know that as a virtual certainty it could receive a high value even if it did little to build out the permit in a timely manner. However, no such advance assurance of assignability would obtain if the field of potential buyers were to be as small and as capital-deprived as the field of potential minority buyers. Furthermore, allowing the sale of expiring permits to anybody would undermine the comparative hearing policy by delivering no pro-diversity benefits to the public -- exactly the kind of result criticized in Bechtel I.

^{37/} See Adarand, 515 U.S. at 229 (race-based rebuttable presumption used in certification as a socially disadvantaged business is subject to strict scrutiny).

^{38/} Id. at 210.

The closest analogy to the Entravision proposal is the distress sale policy, which the Commission has continued to apply after Adarand.^{39/} The distress sale policy is an optional way for a licensee at risk of losing its entire investment (through hearing) to preserve some of its investment by selling to a minority at a below-market price. The minority buyer thereby receives an opportunity to provide service rapidly to the public without the severe capital acquisition difficulties minorities encounter otherwise. Thus, it is worthy of note that in a holding not overruled by Adarand, the Supreme Court found that the distress sale policy meets intermediate scrutiny and did not encroach upon legitimate expectations of nonminorities:^{40/}

No one has a First Amendment right to a license.... Applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership...award of a preference in a comparative hearing or transfer of a station in a distress sale thus contravenes no legitimate, firmly rooted expectation of competing applicants.

The distress sale policy was designed to target some of the substantial barriers to entry for minority owners. The Entravision proposal is similar, and also undermines no legitimate expectations of nonminorities. Like the distress sale policy, it actually provides an otherwise unavailable benefit to the (usually nonminority) sellers. It is a "win-win."

^{39/} Desert Broadcasting Co., supra.

^{40/} Metro Broadcasting, 497 U.S. at 597-598.

B. The Rule Would Satisfy Intermediate Scrutiny

When evaluated under intermediate scrutiny, a race-conscious classification is permissible when it is substantially related to an important governmental objective.^{41/} As discussed above, the Entravision proposal would be grounded on well-defined statutory authority. Congress has decreed that licenses be granted in a manner that promotes program diversity. Congress and the Commission have long attempted to achieve this objective. In Metro Broadcasting, the court declared that the interest in programming diversity, and the empirical nexus between minority ownership and program diversity, were important governmental objectives within the power of Congress.^{42/}

The transfer of expiring construction permits to minority owned broadcasters advances these objectives: it remedies past and present discrimination which distorts the market, and undercuts the tendency toward concentration, two trends that have hindered expanded minority ownership of broadcast outlets.

Like previous minority ownership programs, the proposed rule would counter discriminatory practices against potential entrants that have restricted artificially their management and ownership opportunities. Artificial barriers to ownership erected by the private sector begin with lack of access to management and training ownership opportunities for minorities and end with discrimination in obtaining financing

^{41/} Metro Broadcasting, 497 U.S. at 564.

^{42/} Id. at 567.

and capital. Word-of-mouth recruitment and discriminatory promotion practices continue to limit the ability of minorities to obtain crucial skills necessary for obtaining ownership.^{43/} Minority owners also experience artificial barriers to obtaining credit or financing for communications companies. Undercapitalization has been a significant barrier for minorities. Studies initiated in the private sector and by Congress reveal that lenders discriminate against minority borrowers with the same credentials as White males who are approved for loans.^{44/} Even where lenders do not discriminate, they cite lack of industry and broadcast experience as bases to deny financing.^{45/} Documented evidence of discrimination in the marketplace supports the government's interest in creating programs such as Entravision's proposed rule.

^{43/} See Christopher Edley, Not All Black and White 183 (1996); Barbara Bergmann, In Defense of Affirmative Action 79 (1996); University of Massachusetts Barriers to Employment and Work-Place Advancement of Latinos: A Report to the Glass Ceiling Commission 52 (August, 1994). See also Section 257 Proceeding, 11 FCC Rcd at 6306 ¶38 (commenting on link between employment discrimination and ownership in the communications industry).

^{44/} See, e.g., Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Department of Commerce, Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries, Executive Summary (1995) (<<http://www.ntia.doc.gov/opadhome/mtdpweb/finover.htm>>); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 5th Report and Order, 9 FCC Rcd 5532, 5573-5574 ¶98 (1994) (Black and Hispanic applicants were 60% more likely to be turned down for loans than similarly situated white applicants, and held to higher standards to qualify for loans).

^{45/} "Broadcast Ownership Rules Studied", Washington Post, Dec. 16, 1994, at B1.

The Commission's regulatory initiatives of the last decade have failed to stem the trend towards media monopolies. Trade journals report that "in the average metro market, the top four owners now account for 90% of total advertising revenue."^{46/} The outlook for programming diversity is dismal. Minorities bear the brunt of this damage because discriminatory practices had already put them at a disadvantage with respect to ownership opportunities. Consolidation has led to a decline in minority ownership.^{47/}

Minority entrepreneurs who already experience discrimination in obtaining credit and start-up capital are further marginalized by the regulations which have increased concentration of ownership. If the post-1996 regulatory scheme has had one prominent impact, it is increased cost of

^{46/} Id. See also "Industry Surveys: Broadcasting & Cable," Standard & Poor's, Jan. 7, 1999, at 6 ("S&P") (industry analysts predict that "the Telecommunications Act of 1996 and other recent federal legislation and FCC rule changes...have added fuel to the mergers and acquisition fires that have been raging for a number of years." To put it mildly, this trend is unlikely to be reversed by possible relaxation of multiple ownership rules, multiple national audience reach caps rule, elimination of newspaper and broadcasting crossownership prohibitions, increases of local radio ownership caps and increases in the thresholds for counting active and passive investors.

^{47/} See Kofi Ofori, Karen Edwards, Vincent Thomas and John Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio (1996). See also A. DeBarros, "Radio's Historic Change: Amid Consolidation, Fear of Loss of Diversity, Choice," USA Today, July 8, 1998, at 1A-2A.

doing business.^{48/} Minority radio and television outlets would reduce concentration of ownership while simultaneously increasing programming diversity.^{49/} Minority ownership has a clear nexus to programming diversity.^{50/}

Like the distress sale policy, the Entravision proposal is appropriately limited in scope.^{51/} The proposal is not broad in its application or impact but rather is reasonably tailored to advance substantially the interest in programming diversity. The rule is a constitutionally sound alternative available to the Commission.

CONCLUSION

The Entravision proposal is a creative way to promote administrative efficiency, provide more rapid service to the public, and promote minority ownership all at the same time. The Commission should tentatively endorse the proposal and issue a notice of proposed rulemaking on an expedited basis.

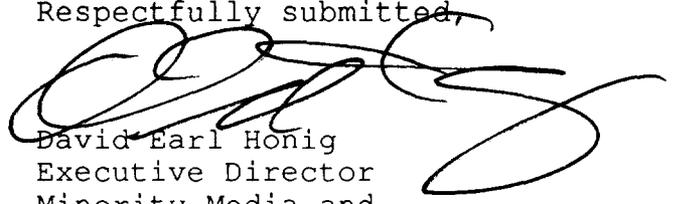
^{48/} See, e.g. S&P at 9 ("larger radio, television and cable groups are generating increased operating efficiencies and other advantages that accrue with size, such as greater clout in dealing with networks, other programming suppliers and advertisers.")

^{49/} See H.R. Conf. Rep. 97-765, at 26 ("[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public.")

^{50/} Metro Broadcasting, 497 U.S. at 563; NAACP v. FPC, 425 U.S. at 670 n. 7.

^{51/} See Metro Broadcasting, 497 U.S. at 549.

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May 24, 1999

CERTIFICATE OF SERVICE

I, David Earl Honig, hereby certify that I have this 24th day of May, 1999 caused a copy of the foregoing "Comments" to be delivered via U.S. First Class Mail, postage prepaid, to the following:

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