

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

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In the Matter of)

Creation of a Low Power Radio Service)

MM Docket No. 99-25

) RM-9202

) RM-9242

TO THE COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
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PETITION TO CORRECT INADVERTENT OMISSION

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Summary

On August 2, 1999, the 24 organizations filing this Petition filed their Comments in this proceeding. The bulk of our comments contained two central proposals:

(1) the Commission should award the first "window" of LPFM licenses to minority broadcast training institutions ("MBTIs"); and

(2) the Commission should allow commercial broadcasters that assist MBTIs with sales training to place commercial inventory on the MBTIs, to the extent necessary to facilitate the training.

Our proposals were intended to promote minority broadcast education, prevent discrimination, remedy past discrimination and its consequences, promote diversity, and provide relief for full power commercial broadcasters who assist MBTIs.

Through apparent inadvertence, the Report and Order in this proceeding did not mention or dispose of these proposals. As shown herein, the proposals were substantial, and it would be error not to rule on them. They fall squarely within the scope of the proceeding, which focused on who should be awarded LPFM licenses, how the licensees were to sustain themselves, and how LPFM can be structured to reduce economic burdens on incumbent broadcasters.

MBTIs need broadcast licenses to train their students. Airlines don't hire pilots who trained only on a simulator, and hospitals don't hire surgeons who trained only on a plastic dummy. Broadcasters don't hire talent or salespeople unless they trained on live radio.

MBTIs do not have these licenses because of state-sponsored and often FCC-assisted discrimination. Fortunately, this historic wrong is easy to remedy race-neutrally because an MBTI is defined not by race but by its mission. For constitutional purposes, an MBTI has no "race." Thus, assistance to MBTIs is constitutionally noncontroversial, as NASA, HUD, DOD and DOE have recognized through their assistance programs specifically targeted to these schools.

This proceeding may be the Commission's last chance to provide MBTIs with broadcast licenses. If the Commission fails to afford MBTIs that chance, it will set in concrete a separate-but-unequal system of broadcast education. History should not consign MBTIs to inferior facilities because of the FCC's inadvertent accident in the processing of rulemaking comments.

The Minority Media and Telecommunications Council ("MMTC") and the 23 organizations it represents in the Low Power FM proceeding ("Civil Rights Organizations"), pursuant to 47 C.F.R. §1.415,^{1/} respectfully call the Commission's attention to an error in the Report and Order, FCC 00-19 (released January 27, 2000) ("LPFM R&O").^{2/} We seek expedited action to obviate the necessity of a petition for reconsideration, which could delay initiation of LPFM service.^{3/}

Background

The Civil Rights Organizations, which include most of the nation's leading minority organizations and virtually all of the nation's MBTIs, are certainly delighted that the Commission has created a much-needed low power FM service. Nonetheless, we are obliged to point out that the LPFM R&O inadvertently omitted to mention, rule on, or otherwise discuss two central proposals in our comments (occupying 46 of its 80 pages) ("Civil Rights Organizations Comments"), filed August 2, 1999. Therein, we proposed that the Commission award the first window of LPFM licenses to MBTIs, and allow commercial broadcasters that assist MBTIs with sales training to place commercial inventory on the MBTIs to the extent necessary to facilitate the training. Our proposals were intended to:

- (1) assist MBTI's in fulfilling their mission of educating minorities in broadcasting;
- (2) prevent discrimination;
- (3) remedy past discrimination and its consequences;
- (4) promote diversity; and
- (5) provide relief for full power commercial broadcasters who assist MBTIs.

Our two proposals were interrelated, but either of them could be granted independently of the other.

^{1/} This Petition is filed under §1.415 (governing the filing of comments in response to a notice of proposed rulemaking) rather than under §1.419 (petitions for reconsideration of rulemaking orders.) A petition for reconsideration would be unripe because the Commission's inadvertent omission to rule on our proposals means that there has not yet been any "final action" subject to reconsideration within the meaning of §1.429(a). A party seeking reconsideration must "state with particularity the respects in which petitioner believes the action taken should be changed", §1.429(c), but we cannot do that yet. No "action" has been "taken" because the Commission has not yet "consider[ed] all relevant comments and material of record", as it must do "before taking final action in a rulemaking proceeding." 47 C.F.R. §1.425.

^{2/} The views expressed in these Reply Comments are the institutional views of the Civil Rights Organizations, and do not necessarily reflect the views of any individual officer, director or member of any of the Civil Rights Organizations.

^{3/} The underlying rules were published in the Federal Register on February 15. See 65 F.R. 7615. Consequently, petitions for reconsideration are due on March 16.

We attach the inadvertently disregarded portions of the Civil Rights Organizations Comments, pp. 34-80.

The Commission made an honest mistake in omitting to consider our proposals.^{4/} These things can happen in good faith in a large and complex proceeding.

Now that the mistake has been noted, the Commission must evaluate our proposals by placing itself back into the decision-making posture it assumed in September, 1999. At that time, after the comments and reply comments had been filed, it had several mutually exclusive proposals before it, and it was charged with selecting among them and harmonizing any conflicts. Our proposals must now be considered on an equal footing with the other proposals, irrespective of the choices derived from an incomplete set of comments in the LPFM R&O. It would be unfair to elevate our burden of persuasion to that of a petitioner for reconsideration -- i.e., by requiring us now to show that a previous decision should be "changed", 47 C.F.R. §1.429(c). That course of action would punish us for the Commission's inadvertent error.^{5/} Thus, the Commission cannot respond to this Petition by simply declaring that our approach is somehow inconsistent with or less desirable than the approach it took in the LPFM R&O. Because our proposals were not considered, the LPFM R&O's approach has not decisionally vested.

Our proposals are substantial, they fall squarely within the scope of the proceeding, and they present no constitutional impediments. Furthermore, they are essential if the Commission wants to stop perpetuating the discrimination-induced spectrum access inequality visited by former commissions on the MBTIs and their students.

To the best of our knowledge, no party opposed our proposals.

Fortunately, the Commission's error is easily corrected. The Commission has not hesitated to grant immediate relief when it discovered that it inadvertently forgot to consolidate, for public comment, a rulemaking petition which is mutually exclusive from one which was

^{4/} It would be too facile for an agency to claim that it actually "considered" a substantial proposal it did not mention. As shown infra, for purposes of 5 U.S.C. §553(c), §706(2)(A) and §706(2)(D), no meaningful judicial review of any such secret "consideration" would be possible. A reviewing court would only be "left to guess as to the agency's findings or reasons." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) ("Greater Boston").

^{5/} This principle is logically analogous to the well known Ashbacker concept, under which mutually exclusive applications must be considered simultaneously. The Commission cannot grant one application and then consider whether a grant of the other one should be made even if it disturbs its earlier decision. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

issued for comment,^{6/} or inadvertently did not consider comments properly filed in a proceeding,^{7/} or issued a decision, that, upon reflection, a majority of the commissioners consider to have been a mistake.^{8/}

I. The APA Requires The Commission To Consider Our Proposals

An agency is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments....After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. §553(c); see 47 C.F.R. §1.425 (Commission "will consider all relevant comments and material of record before taking final action in a rulemaking proceeding and will issue a decision incorporating its finding and a brief statement of the reasons therefor.")

The standard for judicial review of an agency's rulemaking decision, to the extent it is based on legal conclusions, is whether it is "arbitrary and capricious", 5 U.S.C. §706(2)(A), or "without observance of procedure required by law", 5 U.S.C. §706(2)(D). Specifically, an agency must provide a "reasonable procedure with fair notice and opportunity to the parties to present their case." Greater Boston, 444 F.2d at 851. It must take a "hard look" at the salient problems," and give "reasoned consideration to all the material facts and issues" so that a reviewing court is not "left to guess as to the agency's findings or reasons." Id.

^{6/} See Reexamination of the Policy Statement on Comparative Broadcast Hearings (Order), 7 FCC Rcd 3192 (Gen. Counsel 1992). The Commission sought comment on a proposal for a "finders preference" but forgot to consolidate a mutually exclusive proposal by the NAACP, LULAC and NBMC seeking stronger minority incentives. The Commission allowed an additional week for comment because the civil rights organizations' petition for rulemaking "inadvertently was not" assigned an "RM" number. Id. at ¶2. Unfortunately, the Commission did not set out what the civil rights organizations' petition for rulemaking was about or what its merits might be, as it had done for the finders preference petition.

^{7/} AM Radio Stereophonic Transmitting Equipment Standard (Supplemental Order), 9 FCC Rcd 1907 (1994) (ruling, on Commission's own motion, on proposals contained in several comments that "had been inadvertently overlooked"). But see Technical Assignment Criteria for the AM Broadcast Service (Report and Order), 6 FCC Rcd 6273, 6307 ¶111 (1991), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) (subsequent history omitted) (failing to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and the National Black Media Coalition, which sought minority ownership incentives for occupancy of the 1605-1705 kHz AM expanded band; then rejecting the organizations' more modest proposal, offered in the proceedings on reconsideration, because it "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments the Commission had disregarded.)

^{8/} WQED Pittsburgh (Order on Reconsideration), FCC 00-25 (released January 28, 2000) (reconsideration granted on Commission's own motion on the day petitions for reconsideration would have been due. The issue related to religious broadcasting.)

Thus, the Commission cannot lawfully fail to consider substantial proposals that fall within the scope of its proceeding. We demonstrate below that our proposals are entitled to consideration.

A. Proposal #1: A First Window For MBTIs

We asked the Commission to reserve its first window for LPFMs for MBTIs, "including historically Black colleges and universities ('HBCUs'), Hispanic serving institutions ('HSIs'), Native American Tribal Colleges ('NATCs') and non-college training schools serving African Americans, Hispanics, Asian Americans and Native Americans." Civil Rights Organizations Comments at 34, 66.

We outlined, at great length, the sordid history of the Commission's use of its licensing and license renewal powers to ratify and validate state-sponsored discrimination against minorities and against MBTIs. Id. at 37-49. We documented how segregationist state governments, with the Commission's affirmative assistance, manipulated college-level broadcast training in a manner calculated to deny minorities an opportunity to secure the skills needed to secure broadcast employment and ownership. Id. at 37-39. We revealed the consequences of that FCC-assisted policy -- that White schools had a ten-year headstart over minority schools in operating broadcast facilities, and White schools' broadcast facilities operate with 20% more power than those of HBCUs and mean HAAT 2 1/2 times HBCUs' stations' mean HAAT. This history and these statistics compel the conclusion that "the HBCUs were given a late start, after which they received second class broadcast facilities." Id. at 38 n. 76. Nonetheless, "even today, the FCC does not inquire into whether state noncommercial licensees discriminate in the allocation of broadcast facilities among their campuses." Id. at 48.

Finally, we explained how assistance to MBTIs would help the Commission achieve its diversity goals by assuring broadcasters a flow of trained minority applicants.^{9/} Id. at 74.

Granting this proposal would require a slight departure from the approach taken in the R&Q; see pp. 1-2 supra (noting that "because our proposals were not considered, the LPFM R&Q's approach has not decisionally vested.") However, this proposal and the approach

^{9/} On the same day that it adopted the LPFM R&Q, the Commission voted to adopt EEO rules more limited than the original ones. See Broadcast and Cable Equal Employment Opportunity Rules and Policies (R&Q), FCC 00-20 (released February 2, 2000). The unavoidable weakness of these new EEO rules enhances the need for LPFM-assisted training initiatives. Because the MBTIs are the most effective training vehicles promoting the goals of the EEO Rule, they should be afforded relief here.

described in the LPFM R&O are easily harmonized. The Commission can simply open and close an MBTI window a day before the general window opens.^{10/} Alternatively, the Commission could include MBTIs in the first window while granting them a very weighty preference.

B. Proposal #2: Incentives For Commercial Broadcasters To Assist MBTIs

We sought approval of "joint venture arrangements that reward and incentivize commercial broadcasters to assist MBTIs in training students." Civil Rights Organizations Comments at 76. Specifically, we proposed that "to the extent that a commercial broadcaster helps an MBTI to train students in broadcast sales, the commercial broadcaster should be permitted to place a limited amount of sales inventory on the MBTI's LPFM station and share the proceeds of those sales equally with the MBTI." Id. at 77. We identified five distinct advantages of this proposal: it would (1) encourage commercial broadcasters to help MBTIs develop first rate broadcast sales programs; (2) give the industry access to a large number of highly trained radio salespeople;^{11/} (3) help bring commercial broadcasters into mentoring contact with MBTI students and faculty; (4) give community-minded commercial broadcasters an opportunity to earn a modest profit from some LPFMs;^{12/} and (5) help MBTIs financially sustain their LPFM-assisted training programs. Id. at 78-79.

II. Our Proposals Were Substantial

An agency need not rule on each and every insignificant point raised by commenters in a notice and comment rulemaking proceeding. However, an agency cannot disregard 46 pages of comments, by 24 respected organizations, on matters central to the purpose of the proceeding. Compare Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279-80 (D.C. Cir. 1997) (brief mention of issue in a footnote did not give the agency a "reasonable opportunity to pass" on an argument, which is a condition precedent to judicial review under 47 U.S.C. §405(a)(2)).

MBTIs' lack of access to broadcast licenses is a substantial issue because it diminishes the quality of education at MBTIs and inhibits the creation of new MBTIs. Training broadcasting

^{10/} Prudent applicants almost always file on the last day of a window. They do this to prevent application mills from copying their engineering, and to avoid disclosing their proposals to potential competitors. Thus, the Commission could easily open very narrow windows, e.g., one day.

^{11/} As we noted, "the single greatest human resource need of every commercial broadcaster is trained salespeople." Id. at 77.

^{12/} This initiative would thus provide some measure of relief to those commercial broadcasters who fear economic competition from LPFMs.

students without a radio station is extremely difficult, because classroom simulations are poor substitutes for the immediacy, time-sensitivity, interactiveness, unpredictability and audience demands of live radio. MBTIs need broadcast licenses to train their students. Airlines don't hire pilots who trained only on a simulator, and hospitals don't hire surgeons who trained only on a plastic dummy. Broadcasters don't hire talent or salespeople unless they trained on live radio.

MBTIs' need for economic support for LPFM is also a substantial issue. As Commissioner Ness declared, "I also support the Chairman's call for more ownership opportunities for women and minorities who are finding it more and more difficult to enter broadcasting as consolidation drives up station prices and access to capital continues to be scarce of new entrants. But I underscore that those interested in low power radio must seriously assess the economic requirements of launching and sustaining a new business, whether on a commercial or noncommercial basis." Creation of a Low Power Radio Service (NPRM), 14 FCC Rcd 2471, 2535 (1999) ("LPFM NPRM") (Statement of Commissioner Susan Ness). Our second proposal, calling for placement of inventory on MBTIs' LPFM stations by commercial broadcasters who help train MBTI students in broadcast sales, directly addresses this economic need.

Our second proposal also addressed an issue raised by some commercial broadcasters and by Commissioner Powell: the economic consequences of LPFM for small broadcasters. Our proposal would create a framework by which commercial broadcasters can incubate MBTIs and benefit economically by doing so. Broadcast sales training is impossible without live inventory to sell, schedule, produce and broadcast. By helping MBTI students learn these skills, commercial broadcasters can serve an important public interest goal and share the economic rewards.

III. Our Proposals Were Well Within The Scope Of The Proceeding

One of the key issues in the proceeding was selection criteria for applicants. See LPFM NPRM, 14 FCC Rcd at 2494-97 ¶¶57-63. Since we proposed a selection criterion favoring a particular class of applicants, our comments fell squarely within the scope of the proceeding. Even if the proceeding's scope were defined more narrowly, e.g., as how to "expand diversity of ownership", see LPFM R&O at 13 ¶29, our comments would still fall within the scope. By training a diverse student body, MBTIs contribute profoundly to diversity of ownership.

Another key issue in the proceeding was whether commercial content may be accepted on LPFM stations. LPFM NPRM, 14 FCC Rcd at 2498-99 ¶69. Our second proposal directly addressed this question, and also responded to the NPRM's request for comment on whether

there might be any "possible cooperative arrangements (short of attributable interests...) among LPFM licensees that might facilitate the new service's development without unduly diluting its benefits[.]" LPFM NPRM, 14 FCC Rcd at 2495 ¶58. See Civil Rights Organizations Comments at 76.

Our proposals also fall squarely within the scope of interests the federal courts expect agencies like the FCC to address when they apportion federal resources. The continuation of discriminatory licensing policies and their effects violates the due process clause of the Fifth Amendment. Id. at 51. As the Supreme Court has held, a state actor responsible for separate but unequal educational facilities is constitutionally required to eliminate all vestiges of previous segregation. See Ayers v. Fordice, 515 U.S. 717, 729 (1992) ("Ayers") (requiring the State of Mississippi to equalize facilities among its separate but unequal colleges). The separate but unequal resource management criticized in Ayers closely resembles the FCC's own apportionment of broadcast licenses for training facilities; see discussion in Civil Rights Organizations Comments at 39, 61-63. For its part, the D.C. Circuit has long expected the Commission to consider whether the particular licensing and spectrum management decisions it makes might perpetuate, or could help cure, minority disability and exclusion. See Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) ("Garrett").

Before Garrett, committing discrimination typically managed to fall within the scope of Commission proceedings. Today, preventing and remedying discrimination should automatically fall within the scope of the Commission's proceedings.

Under Section 151 of the Act and other authorities, "[n]ot only can the Commission remedy the consequences of its ratification of its licensees' discrimination, it must do so." Id. at 34. An agency "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."^{13/}

Thus, the Commission can -- indeed must -- remedy the consequences of its own discriminatory licensing scheme. See Civil Rights Organizations Comments at 49- 63.

^{13/} City of Richmond v. J.A. Croson Co., 488 U.S. 468, 492 (O'Connor, J., 1989).

IV. There Are No Constitutional Impediments To Granting Our Proposals

As noted above, a grant of our proposals would help remediate past racial discrimination. Our proposals achieve this desirable result race-neutrally, because MBTIs are defined by their mission, not by race.^{14/}

Assistance to MBTIs is constitutionally permissible "because race is not the basis for classification of the schools that would benefit from the program." *Id.* at 67-68. For constitutional purposes, an MBTI has no "race." In particular, the schools "do not draw their designation from the makeup of their student bodies, but from their historical mission. The schools could maintain their historical designation even if the predominant population were White, as long as the historic mission had been, and continues to be the education of minorities." *Id.* at 68. Indeed, an MBTI can be controlled by members of any race, and its student body can have any racial composition. See "White Students Outnumber Blacks at Some of the Nation's Historically Black Colleges", *JET*, February 28, 2000, at 31 (citing, among others, the 9% Black enrollment at Bluefield State College in West Virginia and the 29% Black enrollment at Lincoln University in Missouri). We provided extensive statutory support for the mission-based treatment of HBCUs, HSIs and NATCs, and gave examples of programs at NASA, HUD, DOD and DOE that specifically benefit historically minority schools without being race-conscious and thus potentially falling afoul of the standards in Adarand Constructors v. Peña, 515 U.S. 200 (1995) ("Adarand"). Civil Rights Organizations Comments at 68-72.

Thus, assistance to minority schools is constitutionally noncontroversial. Assistance to minority schools is so noncontroversial that proposals aimed at improving opportunities for students at minority high schools and colleges are central to the plans of state education authorities in California, Texas and Florida who otherwise seek to abolish affirmative action in college admissions.

^{14/} We recognize that without a disparity study, the Commission might be unable to grant relief targeted specifically to applicants on the basis of their minority ownership. Although no party in this proceeding sought race-conscious relief in any form, the R&O referred to Adarand as a reason not to select a lottery system. See LPFM R&O at 55 and n. 223 ("there are unresolved legal and policy issues surrounding the use of a lottery system that pose a risk of delaying the introduction of LPRM service to the public [fn. 223: See Adarand Constructors v. Peña, 515 U.S. 200 (1995).]" The LPFM R&O's reference to Adarand appeared to be limited to the lottery question, since the Commission did not refer to Adarand in the context of assisting MBTIs.

V. Granting Our Proposals May Be The Last Chance The Commission Will Have To Remedy Past Discrimination Against The MBTIs

This proceeding is MBTIs' last realistic chance to secure a broadcast license for student training. If the Commission fails to afford MBTIs that chance, it will set in concrete a separate-but-unequal system of broadcast education.

Although MBTIs would be allowed to seek licenses under the system articulated in the LPFM R&O, their chances of winning more than a token number of licenses are remote. While virtually all MBTIs will qualify under the "established community presence" criterion in LPFM R&O at 54 ¶136, so will dozens of other applicants. Each MBTI is likely to be overwhelmed by a large number of mutually exclusive and far less deserving applicants. Most MBTIs are in large, spectrum-crowded southern cities. Civil Rights Organizations Comments at 65. Thus, "the odds of winning an LPFM permit in these cities under a simple first-come, window or hybrid system are slight." Id. Indeed, there were 13,000 expressions of interest for LPFM. LPFM NPRM, 14 FCC Rcd at 2476 ¶11. We estimated that without special relief, MBTIs might win only about eight LPFM licenses. Civil Rights Organizations Comments at 66.

MBTIs "face special barriers to entry that cannot be overcome by a window, first come, or hybrid application acceptance approach. Educational institutions are not suited to the rapid response that small nonprofits are famous for. Colleges and universities, especially state schools, must undergo budget reviews, trustee and legislative approval processes which can consume months or more. Universities do not turn on a dime. Many of them would need to overcome the historical lack of support of their boards and state legislatures for minority broadcast education." Id. at 64. Indeed, some of the very same schools that historically have been first in line for state funds -- and for FCC full power license awards -- will again be first in line for LPFMs. On the other hand, if state governments and other minority schools' governing boards knew that the Commission might provide LPFM licenses to MBTIs, "they might be more likely to create MBTI programs built around potential LPFM licenses." Id. at 65.^{15/}

^{15/} Share-times are not the answer; they are virtually useless for MBTIs. Broadcast training programs use student stations constantly. These stations must be located on campus or in an off-campus training facility to permit access by the students and teachers. Furthermore, university boards of trustees typically expect their student stations to serve as a window for the community on college life. If a share-time operator has markedly different broadcast policies than the university, a share-time will not work because the audience will be confused, to the university's detriment.

The Commission should resist the temptation to delay action on our proposals by urging us to submit them as a petition for rulemaking. That would generate years of delay, after which the broadcast spectrum will be fully saturated.^{16/} The full power spectrum in major markets is already virtually exhausted, and it has been difficult for the Commission just to make available these few low-power licenses. While digital audio broadcasting ("DAB") theoretically could provide some room for nonincumbents, that appears unlikely.^{17/} There simply are not going to be more opportunities to cure the disabilities faced by MBTIs in securing spectrum for student training.

The Commission should also resist the temptation to delay consideration of our proposals by urging us to raise our proposals again in a pending adjudication. That will be too late. The Courts expect licensee eligibility and grantability issues to be addressed in the original rulemaking proceedings. See, e.g. TRAC v. FCC, 836 F.2d 1349, 1355-56 (D.C. Cir. 1988). Indeed, ruling on these questions now will help all parties, including MBTIs, be aware of how the Commission intends to process applications, enabling all potential applicants to make intelligent resource-allocation decisions on whether and where to file applications.

While our proposals are not a complete remedy for discrimination against MBTIs, they are "the only tool currently available. The FCC should do the best job it can with the only tool it has." Civil Rights Organizations Comments at 67.

^{16/} For example, in 1994, the minority ownership proceeding, MM Docket Nos. 94-149 and 91-140, was bundled with the multiple ownership and attribution proceedings. The Commission "intentionally set parallel comment filing deadlines in the three companion rulemaking proceedings...so that we could review the comments in the three proceedings concurrently 'to assure a coordinated approach to the three proceedings.'" Attribution of Broadcast Interests (Order), 10 FCC Rcd 5670 ¶4 (citing Attribution of Broadcast Interests, NPRM), 10 FCC Rcd 3606, 3613 §11 (1995). The proceedings were decoupled in 1997. Last year, the multiple ownership and attribution proceedings were completed, although the minority ownership proceeding languishes. See Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council, MM Docket No. 91-2212 (Multiple Ownership), (filed October 18, 1999) at 6-11. Another example: the "Petition for Rulemaking on Minority Ownership", filed by the NAACP, LULAC, NBMC and the National Hispanic Media Coalition on September 18, 1990 (that's not a misprint) has still not been acted upon or even been assigned an "RM" number. Respectfully, the petition for rulemaking route for minorities at the FCC is a highway to regulatory Siberia.

^{17/} Furthermore, in its DAB proceeding, the Commission failed even to seek comment on minority ownership, training, or MBTI support and remediation. See MMTTC Comments, Digital Audio Broadcasting, MM Docket No. 99-325 (filed February 22, 2000) ("MMTC DAB Comments") at 13 n. 36 (discussing Digital Audio Broadcasting Systems and Their Impact on Terrestrial Radio Broadcast Service (NPRM), 64 F.R. 61054, FCC 99-327 (released November 1, 1999); see also MMTTC DAB Comments at 10-13 (documenting the Commission's failure to address or even mention minority ownership issues in numerous other rulemaking decisions in the last quarter of the 20th Century).

VI. Our Proposals Present No Practical Difficulties

We recognize that there are other deserving entities besides MBTIs seeking LPFM licenses. But very few potential LPFM applicants are as deserving as an MBTI. A training institution, especially one whose purpose is to help bridge the longstanding gap in equal employment opportunity, is simply more deserving than a community group or social club.

The impact of our proposals will be minimal. There are only about 50 MBTIs, not all of which will apply for LPFM licenses. Assisting MBTIs would be no slower, no more expensive, and no less administratively efficient than excluding them. On the other hand, excluding MBTIs on the flimsy ground that righting this historic wrong would require some minor rewriting is tantamount to guaranteeing MBTI's place on the wrong side of the digital divide.

Conclusion

For all of the reasons given above, the Commission is respectfully requested, on an expedited basis, to issue a supplemental order granting our proposals. For far too long, MBTIs have been burdened by inferior facilities, or no facilities. Relief to MBTIs should be granted "yesterday, and that's not soon enough."^{18/} History should not consign MBTIs to inferior facilities because of the FCC's inadvertent omission in the processing of rulemaking comments.

* * * * *

^{18/} Malcolm X, "The Ballot or the Bullet" (1964).

Sincerely,



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Counsel for:

African American Media Incubator
Black College Communications Association
Cleveland Talk Radio Training Consortium
Cultural Environment Movement
Fairness and Accuracy in Reporting
League of United Latin American Citizens
Media Action Network for Asian Americans
Minority Business Enterprise Legal Defense
and Education Fund, Inc.
Minority Media and Telecommunications Council
National Asian American Telecommunications
Association
National Association for the Advancement of
Colored People
National Association of Black Journalists
National Bar Association
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Indian Telecommunication Institute
National Latino Telecommunications Taskforce
Native American Journalists Association
Project on Media Ownership
Puerto Rican Legal Defense & Education Fund
Rainbow/PUSH Coalition
San Diego Community Broadcasting School
Telecommunications Research and Action Center
Women's Institute for Freedom of the Press

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