

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

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In the Matter of
Creation of a Low Power Radio Service

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DOCKET FILE COPY ORIGINAL
) MM Docket No. 99-25
)
) RM-9202
) RM-9242

MAR 07 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO THE COMMISSION

**ADDITIONAL POINTS AND AUTHORITIES AND ERRATUM
TO PETITION TO CORRECT INADVERTENT OMISSION**

The Minority Media and Telecommunications Council ("MMTC") and the 23 organizations it represents in the Low Power FM proceeding ("Civil Rights Organizations") respectfully submit this "Additional Points and Authorities and Erratum" to their February 29, 2000 "Petition to Correct Inadvertent Omission" ("Petition").

1. The Petition contended that the Commission had "inadvertently omitted to mention, rule on, or otherwise discuss," inter alia, our proposal for a first window reserved for minority broadcast training institutions ("MBTIs"). Petition at 1. As shown below, that appears to be correct.

In the interest of completeness, we also note that at p. 51 n. 197, the Report and Order, FCC 00-19 (released January 27, 2000) ("LPFM R&O") states that "for the reasons discussed below, we reject the suggestions of several commenters that the first filing window be reserved for institutions that serve women and minorities, or for applicants with a demonstrated commitment to their communities. See ¶137."^{1/} We are not sure whether the reference in footnote 197 to "institutions" means "minority schools" or whether it has its literal meaning, which would be much broader and would include entities not having an educational purpose. If the Commission meant the use of the word "institutions" literally -- i.e., to include noneducational entities, it follows that the Commission could not have focused on the critical distinction between MBTIs and noneducational minority institutions. That distinction is that unlike noneducational minority social, political or economic or cultural organizations, MBTIs would be defined for equal protection purposes by their mission, rather than by the race of many

^{1/} An agency's discussion of key rulemaking issues in a bare footnote is discouraged. See McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1366 (D.C. Cir. 1992) (warning Commission to refrain from the practice of putting the "heart" of its orders in footnotes).

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of their students. See Petition at 8. In any event, it is not clear that the LPFM R&O's use of the word "institutions" is intended as a reference or a ruling on the merits of our proposal.^{2/}

In any event, the paragraph which the LPFM R&O, at 51 n. 197, promised would contain "the reasons" for not having a first window for "institutions that serve women and minorities" was paragraph 137, at pp. 54-55. Paragraph 137 and the surrounding text and footnotes do not contain any "reasons" for rejecting our proposal for a first window for MBTIs. See Petition at 8 n. 14; see also Petition at 9.

2. The LPFM R&O contains two references to Adarand Constructors v. Peña, 515 U.S. 200 (1995) ("Adarand"), but the Petition referred to only one of them. The Petition noted that the LPFM R&O's first reference to Adarand (at LPFM R&O p. 55 n. 223) "appeared to be limited to the lottery question" and not to MBTIs, "since the Commission did not refer to Adarand in the context of assisting MBTIs." Petition at 8 n. 14. Adarand is also mentioned in the LPFM R&O at 58 ¶146 and n. 239. This second mention of Adarand also does not appear to be focused on the MBTI issue, because the LPFM R&O there addresses comments that "advocate preferences for entities controlled by minorities." LPFM R&O at 58 ¶146. As our Petition noted, "race is not the basis for classification of the schools that would benefit from the program," citing Comments of Civil Rights Organizations, filed August 2, 1999 ("Civil Rights Organizations Comments") at 67-68. As the Petition explained:

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. [Civil Rights Organizations Comments] at 68. Indeed, an MBTI can be controlled by members of any race, and its student body can have any racial composition.

Petition at 8.

^{2/} Nor are we sure whether footnote 197's reference to "several commenters" is intended to include the Civil Rights Organizations. Our comments were not cited, and the LPRM R&O does not mention our proposal or our showing that the Commission is required to remedy the effects of past discrimination through race-neutral means such as assistance to MBTIs.

3. The Petition noted that an agency is required to respond to "substantial" issues raised in comments. Id. at 5-6. We wish to call the Commission's attention to a controlling authority on this point: Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977), cert. denied, 434 U.S. 829, rehearing denied, 434 U.S. 988 (1978) ("HBO"). HBO provides that while an agency need not respond to insubstantial comments, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." HBO defines "what points are significant" as "points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." Id. at 35 n. 58.

4. Finally, the Petition noted that the goal of licensing MBTIs, discussed in the Civil Rights Organizations Comments, could best be achieved by reserving a first window for MBTIs. The LPFM R&O adopted a point system. Id. at 56 ¶139. Nonetheless, the Petition stated that as an alternative to an MBTI-exclusive first window, "the Commission could include MBTIs in the first window while granting them a very weighty preference." Petition at 5. However, we did not define "weighty." To add clarity, we note that even if the Commission's evaluation of the Petition concludes that notwithstanding the urgency of assisting MBTIs, an MBTI-reserved first window will not be opened,^{3/} the Commission could specify that an applicant's status as an MBTI will be entitled to one point, in addition to any points the applicant receives for established community presence, proposed operating hours and local program origination. Such a holding would afford much of the relief sought by the Civil Rights Organizations without modifying the currently contemplated window filing schedule.

^{3/} As the Petition noted, in rendering a de novo consideration of our Petition, the Commission must "plac[e] itself back into the decision-making posture it assumed in September, 1999....Our proposals must now be considered on an equal footing with the other proposals." Petition at 2.

Sincerely,



David Honig
Executive Director

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

March 6, 2000

CERTIFICATE OF SERVICE

I, David Earl Honig, hereby certify that I have this 7th day of March, 2000 caused a copy of the foregoing "Additional Points and Authorities and Erratum to Petition to Correct Inadvertent Omission" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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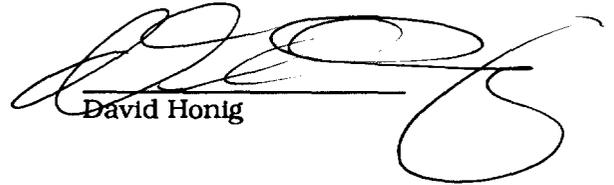
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*/ The "Petition to Correct Inadvertent Error" was inadvertently not served on the Attorney General. It is being served on her today.

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