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Roy Stewart, Esq.
Chief
Mass Media Bureau
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

December 14, 2001

Dear Mr. Stewart:

RE: Multiple Ownership of Radio
Broadcast Stations in Local
Markets (MM Docket No. 01-317)

I write to ask whether the Commission would invite commenting parties in this proceeding to address minority ownership.

The Commission has long recognized that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership." 1/ Consequently, the

1/ Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on Reconsideration), 100 FCC2d 74, 94 (1985) (adopting the Mickey Leland Rule, which allowed companies owning the national limit of 12 TV, AM or FM stations to hold noncontrolling interests in two additional, minority owned stations in that service). See also Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) (adopting the tax certificate policy), repealed in pertinent part, Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. §1071 (1995); but see S. 1711, Telecommunications Ownership Diversification Act of 1999, introduced by Senator John McCain and Senator Conrad Burns (proposing to restore much of the tax certificate policy).

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Commission generally considers the impact of its structural rules on minority ownership. 2/

However, due to the Adarand litigation, there has been a pause in the Commission's efforts to address minority ownership directly through its structural proceedings. 3/ All eyes were focused on Adarand Constructors, Inc. v. Mineta, No. 00-730 (2000 Term) ("Adarand VIII"), which raised this issue. The Solicitor General's brief defended the Department of Transportation's moderately race conscious program, as did the amicus brief filed by MMTC and seventeen other organizations.

2/ See, e.g., 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 ("[w]e seek comment on the relationship between these [broadcast] ownership limits and the opportunity for minority broadcast station ownership" (fn. omitted)). See also id. at 11299, 11304 and 11306 (separate statements, respectively, of Commissioners Ness, Powell and Tristani, each encouraging commenters to address minority ownership). For a discussion of the impact of ownership concentration on minority ownership, see generally K. Ofori, K. Edwards, V. Thomas and J. Flateau, Blackout? Media Ownership Concentration and the Future of Black Radio: Impacts of the Telecommunications Act of 1996 (1997).

3/ In 1995, the Commission recognized that multiple ownership, attribution and minority ownership are closely interrelated. Thus, it called for concurrently filed and crossreferenced comments in proceedings addressing each of these issues. See Review of the Commission's Regulations Governing Television Broadcasting (Further NPRM), 10 FCC Rcd 3524 (1995); Review of the Commission's Regulations Governing Attribution of Broadcast Interests (NPRM), 10 FCC Rcd 3606 (1995); Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 2788 (1995). However, after Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ("Adarand III"), the Commission uncoupled the minority ownership proceeding. Review of the Commission's Regulations Governing Television Broadcasting (Second Further NPRM), 11 FCC Rcd 21655 (1996); Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (Further NPRM), 11 FCC Rcd 19895 (1996); Broadcast Television National Ownership Rules (NPRM), 11 FCC Rcd 19949 (1996) (subsequent histories omitted). In December, 2000, the Commission released five research studies on minority ownership, but the following month it declined to consider MMTC's minority ownership proposals in the TV local ownership proceeding because the Commission had not yet evaluated the December, 2000 studies. Review of the Commission's Regulations Governing Television Broadcasting (MO&O and Second Order on Reconsideration), 16 FCC Rcd 1067, 1079 ¶9 (released January 19, 2001); id. at n. 70 (citing the research studies). Evaluation of the research studies would have been difficult given the pendency of Adarand VIII, but now, with DOT's program landing on solid constitutional ground, a final evaluation of the December, 2000 studies is possible and the Commission may again engage the public to visit the subject of minority ownership.

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On November 9, 2001 -- nine days after Adarand VIII was argued -- the Commission issued its NPRM in this proceeding. Then, on November 27, the Supreme Court decided Adarand VIII, issuing a per curiam opinion holding that certiorari had been improvidently granted.

The timing could not be more fortuitous. Now, for the first time, there is a final order of a court of appeals affirming a race conscious minority contracting program under strict scrutiny. 4/ The socially and economically disadvantaged business model presented by DOT's program is the model MMTC has advocated as the basis for FCC programs to foster minority ownership.

Minority ownership is certainly valuable in advancing the subjects of the NPRM -- diversity and competition. But its greatest value derives from its role in remedying the present effects of past discrimination -- the basis on which the 10th Circuit decided Adarand VIII and the only basis the Supreme Court thus far has articulated that meets the compelling interest prong of Adarand III. The NPRM seeks comment only on diversity and competition but not on remediation, so members of the public may be unsure whether the scope of the NPRM is sufficiently broad to encompass remedial proposals and whether the Commission invites comment specifically on minority ownership.

Thus, in light of the conclusion of the Adarand litigation, MMTC inquires whether the Commission would invite parties to help develop a record on the subject of minority ownership.

Sincerely,



David Honig
Executive Director

cc: Jane Mago, Esq.

/dh

4/ Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII"), certiorari dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, ___ U.S. ___ (November 27, 2001) (per curiam).