(March, 2002) ("Consolidation and Minority Ownership"), commissioned by MMTC and provided as Appendix 1 to these Comments. These findings are reported at pp. 4-5 therein:

- In 1996, among markets with 15 or more stations, there were 222 cases in which a single firm through multiple stations controlled 25% or more of the audience share. In 2000, there were 331 such cases.

- In 1996, the average dominant firm controlled 31% of the audience share in markets 1-10. In 2000, such firms controlled 28% of the audience share for the same market range. The percentage of control over audience share increases as market rank decreases. In market range 201 through 290, the average firm controlled 40% of the audience in 1996 and 41% of the audience share in 2000.

- The average revenue share controlled by the single largest firm is slightly less than the 50% screen, and the average revenue share controlled by the two largest firms exceeds the 70% screen.

- The advertising revenue controlled by the four largest firms in each of the Arbitron markets was 91% in 1996 and 93% in 2000.

The Commission has correctly recognized that in most markets, the spectrum available for radio broadcasting is fully occupied.[49] Consequently, when a platform owner grows, it acquires spectrum at the expense of smaller companies, often standalones. Furthermore, as it grows, the platform owner achieves competitive advantages that add to the difficulties faced by the surviving standalones.

The impact of consolidation on diversity of voices may be analogized to the aftereffects of clear-cutting of a rain forest by

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49/ NPRM at 19882 ¶46 ("[w]hile new entry is possible in some radio markets, it is unusual for a strong new signal to be placed into a market. Because of the scarcity of spectrum, a particular geographic area can support only a certain number of radio broadcasting signals. Generally, the good signals were taken many years ago, resulting in little unused capacity that could support new radio station entry.") Not only is the spectrum pie the same size as before, radio's piece of the advertising pie (7%) is largely unchanged over the past two decades.

corporate agriculture. Mega-farms serve the much-needed purpose of providing food for a hungry population. But as they convert forests to fields, they consume habitat needed by endangered species. That results in a decrease in genetic diversity, which in turn diminishes the robustness and resiliency of the entire ecosystem.

In like manner, consolidation in radio displaces and crowds out endangered small, locally owned and often minority owned companies. That results in a decrease in the intellectual diversity of the radio industry, which in turn diminishes the robustness and resiliency of the free flow of ideas essential to democracy.

The impact on diversity of even a slight increase in consolidation is apparent in the Syracuse market. According to BIAfn's Radio Yearbook 2001, the market has four platforms of 8, 7, 4 and 4 stations. There are seven other licensees with a total of 10 stations. If the four platforms each owned eight stations, there would be only one other voice left in the market, a standalone. The same result would obtain if the two largest platforms grew to ten stations each and the two smaller ones grew to six stations each. It is not obvious how any economic efficiencies not already realized by Syracuse platform operators would translate into broadcast service so superior as to justify the collapse of virtually all independent voices.[50]

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50/ See NPRM at 19883 ¶48, citing, among the possible benefits of consolidation, "efficiencies that result in cost-savings from co-locating facilities, consolidating support services, and eliminating redundant management positions."

To be sure, and as described in the previous section of these Comments, program deregulation may have done even more than consolidation to diminish viewpoint diversity. By the time the post-1996 wave of consolidation began, there simply weren't many viewpoints transmitted over the air by most stations. No one recalls that in 1996, radio was a First Amendment paradise in which most stations were flush with contentious, antagonistic viewpoints.

Still, what remains of viewpoint diversity should not be sacrificed for the sake of the economic efficiencies attendant to consolidation. This is a generalization, but it is fair to say that in a typical market, consolidation has meant that instead of 20 licensees, 17 of whom say nothing, there are now 10 licensees, eight of whom say nothing. Additional consolidation could be the death blow to the handful of independent voices that still broadcast some "antagonistic" viewpoints. It would be a shame if additional consolidation yielded a market with five licensees, <u>all</u> of whom say nothing.

Some may fear that a platform owner might air only its own views on a multitude of stations, while shutting out other views in the fashion of the Hearst newspaper dynasty three generations ago.[51/] The greater risk is that platform owners will swallow or

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<u>51</u>/ The <u>NPRM</u> asks whether or not "commonly owned media outlets [should] be considered a single media 'voice' in evaluating diversity." <u>Id.</u> at 19877 ¶38. Of course the answer is yes. Even if an occasional owner airs views that differ from his own, the Commission can hardly rely on this voluntary behavior as a basis for structural regulation. If an owner freely decides to air only his own views or no views at all, the Commission can hardly respond by requiring divestitures.

financially ruin the eclectic standalone owner whose remains in business to provide viewpoint diversity, hopefully at a profit.

Fortunately, platform owners are not necessarily predators who aim to kill off viewpoint diversity. The public has caught a lucky break from the social responsibility exercised by (among others) the two largest radio licensees, Clear Channel Communications and Infinity Broadcasting Corp. These companies spearheaded the creation of the Quetzal/J.P. Morgan Fund in 1999, which raised $175,000,000 to foster minority ownership. Both companies have recruited minorities as potential buyers of radio stations being spun off, and they practice fair employment, including aggressive recruitment and training. Nonetheless, structural regulation cannot be predicated entirely on the good intentions of mortals. At the end of the day, there is only so much spectrum to be shared, and there is only so much that individuals of goodwill can do to soften the rough edges of the laws of economics.

### 3. While There Can Be "Good Consolidation," "Bad Consolidation" Can Drive Out Potentially Strong Competitors On The Basis Of Historical Disadvantage Rather Than Present-Day Ability

The Commission should distinguish among three forms of consolidation. Two of them often are desirable, but the third is highly undesirable.

1. Merger Of Two Weak Competitors. This is a classic form of "good" consolidation: two companies, each unable to survive on its own, join forces and offer the first effective competition to a dominant company. The merged company generates more competitive strength than the total of the competitive strength marshalled delivered by the two companies separately.

2. Absorption of A Company Incapable Of Ever Competing Effectively. This is also "good" consolidation. In this scenario, a strong but nondominant company absorbs another company that is inherently incapable of competing effectively due to weaknesses in its business plan, its management or its vision. The public often benefits when those lacking in drive, determination, creativity or intellectual capacity are removed from occupancy of a public resource like the spectrum.

3. Absorption Of A Company That Could Have Competed Effectively. This is "bad" consolidation. In this scenario, a dominant company absorbs a company that could have competed effectively had it not been burdened by artificial market distortions beyond its control, such as race discrimination or its present effects. A minority owned company being absorbed in the way may have had a strong business plan, strong management and a sound competitive vision; yet after the 1996 Act it may have been unable to raise financing quickly enough to assemble its own platforms, thereby forcing it into a sale to a dominant company. Minority owned companies' skill sets had to be exceptionally superior in order to have survived a heavier than normal competitive gauntlet. Frequently, these companies made valuable contributions to viewpoint diversity.

Such companies often demonstrate their competitive ability when given the opportunity. A classic example may be seen in the efforts of Clear Channel Communications in 1999 to spin off 110 radio stations attendant to its acquisition of AMFM, Inc. Clear Channel decided to afford minority owned companies an early opportunity to learn about the spinoff stations, design competitive bids and have those bids considered nonpreferentially. MMTC was privileged to have been engaged by Clear Channel to help market the spinoff stations to minorities, and to work with minority owned companies to fashion bids and seek financing. Ultimately, nine minority owned companies bought 40 stations worth approximately $1.7 billion (out of $4.3 billion for all of the spinoffs). This happened because financial institutions recognized that these companies were well managed and could perform if given the chance. In many cases, these companies had demonstrated their superior skill by surviving despite inadequate financing, advertiser ignorance and discrimination, and weak technical facilities. Consequently, they were perceived by financial institutions to be stronger potential competitors than companies that grew the old fashioned way -- through inheritance and old-boy networking.

The effects of the competitive environment facing minority and female broadcasters was comprehensively documented in a study the Commission released in December, 2000. Ivy Planning Group, "Whose Spectrum Is It Anyway? Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing - 1950 To Present" (2000) ("Market Entry Barriers"). The researchers interviewed 120 representatives of small, minority and women owned businesses that had attempted to acquire, sell or transfer a license during the years 1950 - 2000. They also interviewed 30 key market participants, including media brokers, lenders, attorneys, industry leaders, and Commission officials.

The consensus of the interviewees was that for minority and women owned licensees, market entry barriers were exacerbated by the discrimination minorities and women have faced in the capital markets, in the advertising industry, in broadcast industry employment, in the broadcast station transactional marketplace, and as a consequence of various actions and inactions by the Commission and Congress. Further, the study found that market entry barriers have been aggravated by weak enforcement of FCC EEO regulations, underutilized FCC minority incentive policies, use by nonminority men of minority and female "fronts" during the comparative hearing process, the lifting of the broadcast ownership caps, and minimal small business advocacy before the Commission. Congress' repeal of the tax certificate program, which from 1978 until its repeal in 1995 provided tax incentives to encourage firms to sell broadcast licenses to minority owned firms, was regarded by interviewees as a particularly severe blow to minorities' ability to acquire broadcast and cable properties.

The study concluded, inter alia, that (1) the relaxation of ownership caps has significantly decreased the number of small, women and minority owned businesses in the broadcasting industry; (2) the declining participation of small, women and minority owned businesses in broadcasting has resulted in diminished community service and diversity of viewpoints; and (3) the Commission had often failed in its role of public trustee of the broadcast spectrum by not properly taking into account the effect of its programs on small, minority and women owned businesses.

In light of this history, "bad consolidation" threatens to undermine the Commission's ability to promote viewpoint diversity directly (by increasing the number of speakers) and indirectly (by ensuring that capable competitors with something to say are not forced out of the industry). It is not always simple to distinguish between good and bad consolidation in the context of a transaction; thus, bright line rules are necessary to avoid arbitrariness in enforcement.52/ Yet an unavoidable disadvantage of bright-line rules is that they offer no means to avoid bad consolidation up to the level of the bright line. Consequently, before the Commission authorizes any further consolidation, it should ensure that the consequences of discrimination no longer impede the prospects for success of worthy competitors.

### 4. **A Growing And More Diverse Population Requires More Protection For Viewpoint Diversity**

The NPRM inquires "whether the level of diversity that the public enjoys varies among different demographic or income groups."53/ The answer is overwhelmingly yes. The broadcast spectrum is virtually fully occupied, leaving few opportunities for new competitors to emerge. Moreover, existing small competitors risk failure brought on by consolidation. Consequently, it is doubtful that the radio industry possesses sufficient entry

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52/ See pp. 49-50 infra.

53/ Id. at 19875 ¶34. This was a refreshing question to find in the NPRM. Structural rulemakings too often focus exclusively on the supply side of diversity -- the number of stations, owners and viewpoints. It is also important to focus on the demand side -- the number of listeners and their diversity of languages and cultures.

opportunities and flexibility to enable it to respond to changing demographics.

Fifty-six years ago, the Commission recognized that "the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."54/ That goal is becoming more difficult to fulfill, bercaause the spectrum is full with stations but the land is still filling with people. Between 1990 and 2000, the number of people in America rose by almost 33,000,000 -- a 13.2% increase.55/ In 1990, the last year for which data is available, there 13,983,502 persons who speak English "less than 'very well.'"56/ The Census Bureau projects that the population in 2010 will be 13.3% African American, 5.1% Asian American and 14.6% Hispanic.57/

Between 1990 and 2000, the number of radio stations increased by 18.7%.58/ However, it is likely that most of this increase was in medium or small markets or rural areas, and it appears unlikely

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54/ Public Service Responsibility of Broadcast Licensees (Federal Communications Commission, 1946) (the "Blue Book") at 15.

55/ The 1990 population was 248,709,873; the 2000 population was 281,421,906. U.S. Census Bureau, 1990 Summary Tape File 3 (Social Characteristics), Census 2000 Redistricting Data.

56/ U.S. Census Bureau, "Detailed Language Spoken at Home and Ability to Speak English for Persons 5 Years and Over - 50 Languages with Greatest Number of Speakers (1990).

57/ U.S. Census Bureau, Population Estimates Program, Population Division: Annual Projects ot the Total Resident Population, 1999 to 2100.

58/ Broadcasting and Cable Yearbook 2001, p. D-733 (number of radio stations on air as of January 1, 1990 was 10,631; number on air as of January 1, 2000 was 12,615.)

that more allotments can be added in most major cities. It is an understatement that the radio industry is not well prepared to respond to the nation's demographic trends.

The Commission has long appreciated the role of multilingual broadcasting in facilitating Americans' adjustment and survival. The Commission has expressed this view almost since its inception in opinions that display the agency's evolution from paternalism to multiculturalism.[59/] Today, a heterogeneous population demands the widespread availability of specialized ("niche") formats and broadcasts of information and viewpoints in many different languages. While 13 commercial stations may be sufficient for Fargo, ND - Moorhead, MN, 69 commercial stations may not be

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59/ See United States Broadcasting Corp., 2 FCC 208, 223-24 (1935) (looking favorably on "the broadcast of foreign language programs where they were designed to educate and instruct the foreign populace among its listening public in the principles and ideals of our Government and American institutions"); Atlantic Broadcasting Co., Inc., 5 RR 512, 530 (1949) ("[m]utual understanding, tolerance, sympathy and faith between and among the foreign language groups and the more stabilized [!?] citizens of the United States are recognized essentials in our democracy. The public interest is served through the integrating and Americanizing influences exercised and fostered by foreign language radio broadcasting"); Dual-Language TV/FM Programming in Puerto Rico, 52 FCC2d 451 (1975) (in Puerto Rico, where less than 5% of the public speaks English as a first language, dual language service is desirable because it would benefit "persons lacking comprehension of both languages"); Spanish International Communications Corporation, 2 FCC Rcd 3336, 3339 ¶18 (1987) (subsequent history omitted) (taking licensee's Spanish language programming into consideration as a factor mitigating its violation of prohibition on foreign ownership). See also Tele-Broadcasters of California, Inc., 58 RR2d 223, 228 (Rev. Bd. 1985) (Opinion by Member Blumenthal) (looking favorably on comparative proposal to offer Spanish language service because "minority audiences [are] usually the least-served by the mass-audience media.")

adequate for Los Angeles.60/ Fargo has 13,381 persons per station compared to Los Angeles' 185,488 persons per station -- far too few signals to allow for fulltime service to many large ethnic and language communities.61/

In light of the overwhelming inability of the radio industry in large, racially diverse markets to serve the programming needs of significant demographic groups, the answer to the question of whether consolidation in ownership "offset[s] the increases in media outlets"62/ is obvious. There have been no meaningful "increases in media outlets" for millions of Americans. The only theoretical substitutes are woefully unsuited to the task. Internet radio is very new,63/ with an uncertain future,64/ and it

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60/ According to the BIAfn Radio Market Report (2001), and the BIA Radio Yearbook (2001), Fargo, ND - Moorhead, MN is the 214th market. It has a population of 173,952 (3.8% minority). Los Angeles is the 2nd market. It has a population of 12,798,653 (64.0% minority).

61/ We address the status of broadcasting to groups whose primary language is not English or Spanish in our study on platform size and formats, which is discussed at pp. 35-41 infra. As we demonstrate in our study, there is an especially pressing need to redress the almost complete exclusion of Asian language programming from the airwaves.

62/ NPRM at 19876-77 ¶36.

63/ Internet radio occupies only about 4% of radio listening, and less than 2% of radio advertising dollars. While the Internet has allowed people to do personal communications and commercial transactions more efficiently, it has not yet significantly altered the dynamics of radio. The few sites with audio usually provide no local content, and most local internet sites derive their content from local newspapers or broadcast stations, rather than generating it independently.

64/ On February 20, 2002, the Copyright Arbitration Royalty Panel asked the U.S. Copyright Office to conventional radio stations that stream their broadcasts online should pay 0.07 of a cent per

(n. 64 continued on p. 32)

is of little relevance to a family that can afford neither a computer nor on-line charges.[65/] Moreover, notwithstanding its ability and laudable desire to reach niche audiences, satellite radio is very new, and it is priced well above what what low income families can pay.[66/] Furthermore, neither Internet radio nor satellite radio is well positioned to provide programming responsive to needs that are unique to specific localities.

Free, over the air radio is the only medium capable of meeting the huge and specialized demand for audio programming. Satellites and the Internet are approximately as irrelevant to radio regulation today as cable was to over the air television in the 1950s. Television regulation eventually took account of cable, but it is far too early for radio regulation to take much account of satellite and Internet radio.

Consequently, the Commission should regard free, over the air radio as the lifeline for millions of Americans and regulate it accordingly.

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64/ (continued from p. 31)

song per listener, while Internet-only stations should pay 0.14 of a cent per song per listener -- all retroactive to October 28, 1998. This could doom independently owned Internet radio stations. See Dan Carnevale, "Proposed Fees for Broadcasting Sons Online Worry College Radio Officials," The Chronicle of Higher Education, March 8, 2002, p. A32.

65/ The best discussion of the digital divide and its causes is found in NTIA, Falling Through the Net (1999).

66/ XM, the first company with a service available nationally, reportedly protected revenue of $20-25M in 2002 with an operating loss of $270-275M. As of January, 2002, it had 27,733 subscribers. Communications Daily, January 25, 2002, p. 10. Satellite radio costs about $120 per year per receiver, plus a subscription fee of about $10 per month.

### B. More Consolidation Would Increase The Diversity Of Mainstream Formats, But Not Of Niche Formats

Direct micromanagement of formats is forbidden by the First Amendment.67/ Nonetheless, like any other output of a radio station, format can be noticed as part of the macromanagement process by which the Commission develops structural regulations.

#### 1. Platforms Promote Mainstream Format Diversity, While Standalones Promote Niche Format Diversity

The Commission asks whether "competing parties in a market have a commercial incentive to air 'greatest common denominator' programming, while a single party that owns all stations in a market has a commercial incentive to air more diverse programming to appeal to all substantial interests" (emphasis supplied).68/ The key is the word "substantial", a subjective term if ever there was one in communications regulation.69/ "Substantial" ought to mean more than commercially lucrative hybrids of mainstream formats, such as hard rock, modern country or sports. Instead, "substantial" ought to encompass programming aimed at well recognized specialized tastes and at language groups of considerable numerosity; for example, Bluegrass in Washington, D.C.; Hmong in Minneapolis, Haitian Creole in Miami, traditional jazz everywhere, children's programming everywhere. We refer to

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67/ FCC v. WNCN Listeners Guild, supra, 450 U.S. at 582.

68/ NPRM at 19877 ¶37.

69/ Recall the battles a generation ago over whether "substantial" service really meant something different from "minimal" or "superior" service. See, e.g., Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 56-58 (D.C. Cir. 1978) (D.C. Cir. 1978) (subsequent history omitted) (straining hard to find the meaning of "substantial" service").

these by the term most commonly used for them in the radio world, "niche" formats.70/

We maintain that radio succeeds in promoting format diversity when it offers both hybrids and niches. As shown below, the evidence points to two general principles: (1) large platforms do a better job than standalones at reaching hybrids, and (2) standalones in competition with platforms do a better job than the platforms in providing niche formats, as well as Spanish language, classical and religious formats.

The argument that platforms promote some degree of format diversity is empirically sound. In a recent study, the NAB found that "one immediate result [of consolidation] has been an increase in the number of formats available to the American public. Given that consolidation is continuing, and some recent acquisitions have not been finalized, we can only expect this trend to continue."71/

Nonetheless, in practice, only mainstream format diversity is increased by a platform. As a platform grows, its owner assigns each station added to the platform the most lucrative format in the market that is not directly served by the stations already in

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70/ Commissioner Martin states that "[e]vidence suggests consolidation actually enhances program diversity by encouraging owners to create programming that targets niche markets, rather than producing bland programming that has the greatest chance of capturing the greatest number of viewers or listeners." "Martin believes consolidation produces diversity in programming," M Street Daily, December 20, 2001, p. 4. Commissioner Martin is correct on the economics, although he may have been using the word "niche" to refer to hybrids of mainstream formats, rather than applying its more common usage.

71/ Mark R. Fratrik, "Format Availability After Consolidation," (August, 1999) (submitted with the NAB's Comments in MM Docket No. 99-25 (Low Power Radio), Executive Summary, p. 1.

the platform. A platform owner wants to eat into its competitors' audiences, not its own audiences. The audiences for mainstream rock-based formats are huge. These formats are well understood by advertisers. They are inexpensive to program, given the range of syndicated programming and talent available to the platform owner. Consequently, an eight-station platform owner will often choose, e.g., to program bedrock mainstream formats on four of its stations, and to program hybrids on its other four stations. This strategy makes economic sense for a platform owner because it maximizes coverage of the major subsets of consumers whose patronage are valued most by advertisers.

MMTC has performed a study of format diversity that bears this out and also provides insight into the growth of several formats not generally embraced by platform owners. Our study, "The Relationships Between Platform Size and Commercial Formats in Commercial Radio" ("Platform Size and Program Formats") is provided as Appendix 2 to these Comments. Here are our conclusions:[72]

1. Rock-based formats and English language spoken word formats (news, talk, news/talk and sports) tend to be adopted by large platforms. Rock-based formats are less likely to be adopted by standalone stations.

2. Religious, classical, and niche programming tend not to be included in large platforms. Spanish language programming tends not to be included in large platforms except in four markets. These format types, as well as the variety format type, are more likely to be adopted by standalone stations.

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72/ Id. at 21-22.

3. The adoption of rock hybrid formats by large platforms probably has contributed to the proliferation and variety of rock music programming on the radio. In this particular respect, large platforms contribute more format diversity ("variety") to a market than smaller platforms.

4. Cultural and market trends, rather than consolidation, probably have largely accounted for the very rapid growth of English language spoken word programming.

5. Black music is carried across all platform sizes, and the format type has displayed long-term steadiness in station adoption and in carriage as nonformat special programming. Moreover, this format type is available in several largely nonoverlapping hybrids, thereby often providing standalones with the flexibility to counterprogram platforms that adopt a Black format while also providing minority owned platform developers with an opportunity to dominate demographic groups attracted to this programming. These trends underscore the growing respect for the programming by broadcasters and advertisers, while helping to account for the economic soundness of many companies specializing in this programming.

6. Almost no radio stations carry formats or even nonformat special programming in Asian languages, particular Vietnamese and Chinese, notwithstanding the huge populations for which these are the primary languages. On the other hand, programming in European languages with (today) fewer primary speakers (e.g., Polish, German and Italian) is widely available. For example, there are 1/3 as many primary speakers of Polish as Chinese (as of 1990) but from 1991-2001 there was at least 13 times as much programming in Polish. Primary speakers of Asian and European languages each tend to reside in or near large cities; thus, spectrum scarcity alone cannot explain the near absence of Asian language radio programming. Italian, German and Polish Americans faced severe discrimination in and out of broadcasting, but fortunately they largely overcame these barriers by about 1960. What most likely explains the near absence of programming in Asian languages today is that Asian Americans have not yet been as successful in overcoming the entry barriers to broadcasting that have been imposed by discrimination.

7. It is likely that several format types are being embraced by standalone stations as a means of protecting themselves from the advance of consolidation. Standalone operators seek formats that advertisers have to buy, and that consolidators can neither easily duplicate nor sell around. Among the format types whose steady and in some

> cases dramatic growth has probably been fueled by standalone operators seeking protection from consolidators are Spanish language, religious, variety, language niche formats and some non-language niche formats. This last trend might not continue indefinitely, though. Consolidation could advance to the point where there is too little radio advertising money not controlled by platforms to support the surviving standalone stations in any format. Alternatively, platform owners could buy (and convert to mainstream hybrids) so many stations that too few standalones are left to serve the needs of substantial niche audiences.

Our study demonstrates that consolidation probably has had two noticeable effects on radio programming.

First, consolidation is probably responsible for the growing proliferation (variety) of hybrids of mainstream formats. Our data did not permit us to conclude that consolidation has been responsible for adding variety in country/western, English language spoken word (e.g. news/talk), but the phenomenon was clearly evident in the large rock-based popular music category.

Second, platform owners simply do not specialize in niche formats (language-based and otherwise); standalones do. Standalones, rather than platforms, are also the primary home for a number of major mainstream format categories often regarded as nontraditional, including religious formats, classical, and Spanish language programming. We infer that the growth of many niche formats, religious broadcasting, and particularly Spanish language broadcasting has been fueled not by consolidation but by standalone station owners' desire to protect themselves from consolidation. By counterprograming platforms, standalone owners assure their own survival by choosing formats that platform owners are unlikely to duplicate and cannot sell around. This strategy only works, however, if platforms are not permitted to grow so large that they take all the nitrogen (spectrum) and oxygen (advertising dollars) in the market, leaving nothing for smaller companies. That is why we maintain that the Commission should strive to cultivate a marketplace that contains a good balance of platforms and independent standalones. We explain in more detail below.

A policy striving for balance between platforms and standalones would recognize the contributions made possible by each ownership configuration. Consolidation probably contributed substantially to the phenomenon that not all rock stations sound alike anymore. But it cannot be said that this feature of radio, all by itself, should drive radio ownership policy.[73/] Those with specialized tastes or needs, including those for whom English is not the primary language, must be considered too. The availability of three hybrids of English language rock music is meaningless to someone whose primary language is Vietnamese or Polish, or to someone who is intensely devoted to bluegrass or classical music. As our format study demonstrated, standalone stations remain the primary providers of niche formats, and they are by far the primary providers of nonformat special programming serving audiences that,

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73/ One study found that during consolidation, radio markets suffered a much larger loss of owners than they gained in formats, and the gain in formats were hybrids. There was no increase in listening. Steven Berry and Joel Waldfogel, Mergers, Station Entry, and Programming Variety in Radio Broadcasting (1999). This finding is consistent with the well accepted understanding of economists that a narrowcasted program will be broadcast only when it will generate as much advertising as the least attractive of several general audience programs. See S. Wildman and T. Karamanis, "The Economics of Minority Programming," in A. Garmer, ed., Investing in Diversity: Advancing Opportunities for Minorities and the Media (1998) at 47.

while substantial, are not large enough to support a fulltime station format.

There are at least four reasons why an eight station platform owner would seldom prefer to assign a niche rather than another hybrid format to one of its stations.

First, the sheer numerosity of the audience for the strongest unprogrammed hybrid may easily exceed the audience size reachable with the largest niche.

Second, platforms typically consist of "big sticks" -- full coverage, high power FMs, and fulltime, low-band, high power AMs. Niche formats are often targeted to persons living in geographically compact areas, such as inner cities or outlying rural counties. Narrowcasting to these populations may not be an efficient use for a facility whose footprint covers the entire market.

Third, it is less expensive for a station owner to program in a format with which she is familiar and experienced, in which staff are easy to find, and in which numerous sources of program material are widely available at competitive prices. Few group owners possess institutional knowledge of niche formats, inasmuch as few group owners were niche specialists before they operated platforms.

Fourth, advertisers may not understand a niche format, or they may wish to discourage patronage by customers attracted to that niche, especially if the niche is associated with racial minorities. Tactics such as "no urban/no Spanish" dictates (infamously memorialized in the 1996 "Katz Memo," which advised advertisers to seek "prospects, not suspects") are more commonplace than many people realize.

Nonetheless, there surely is a platform size so large that the best unprogrammed hybrid station would add less revenue than the best niche. We do not know if that size is about 10, 20, or 40. We do know that a 100 station platform is big enough to accommodate niches. Both XM radio and Sirius include not only multiple rock, country/western and urban hybrids, they also include one each of an impressive array of niche formats.74/

There must be, then, a "Niche Tipping Point," which may be defined as the number of stations in a platform so large that another station added to the platform would be devoted to a niche format. The Niche Tipping Point may be so large that a platform with that many stations would antitrust standards for oligopoly irrespective of the limitations in Section 202(b)(1) -- that is, it would allow the platform to control so much advertising money and spectrum that nothing is left for those wishing to serve niche or specialized audiences.75/ Without empirical evidence that the

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74/ XM has announced an initial lineup of 91 channels that includes Bluegrass, Rap/Hip Hop, Classical Singing, Classical Jazz, Blues, Reggae, World Music, African Music, Hindi-Indian Programming, Mandarin-Chinese Programming, Radio Disney, Comedy, News in Spanish, African American Talk, and others. Sirius' array of 100 channels includes Bluegrass, Rap/Hip Hop, Classic Jazz, Latin Jazz, Chamber Music, Blues, Reggae, World Music, BBC World Service, BBC Mundo, Radio Disney, Comedy, Arts, and African American Talk, among others.

75/ There are simply not enough frequency allotments available in any market, even New York or Los Angeles, to allow the Commission to test this hypothesis in practice. The unavailability of sufficient allotments to accommodate platforms huge enough to provide niche service demonstrates that the NPRM was in error in suggesting that "the current media marketplace appears robust in terms of the aggregate number of media outlets." Id. at 19875-76 ¶35. That is why it would be a mistake allow consolidation to advance "to the point where there is too little radio advertising

(n. 75 continued on p. 41)

Niche Tipping Point in most markets is barely more than eight stations, it would be risky for the Commission to allow larger platform sizes in the expectation of thereby generating more niche service. Instead, Commission policy should favor a balanced collection of platforms and standalones, thereby ensuring that both hybrid service and unique niche formats are offered. Such an approach would advance "the wider use of radio in the public interest," 47 U.S.C. §303(j), and would also offer the greatest hope for the economic success of the radio industry since it draws as many audiences as possible into radio's tent.76/

### 2. Consolidation Cannot Trigger The Adoption Of New Formats By Small Operators

The Commission tentatively believes that "radio stations generally can and do change format in response to perceived profit opportunities....this ability to change format fairly rapidly and at relatively low cost may often defeat an attempt by a station group to dominate a format or target a demographic in a local market."77/ The Commission also tentatively believes that "the

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75/ (continued from p. 40)

money not controlled by platforms to support the surviving standalone stations in any format" or to permit platform owners to "buy (and convert to mainstream hybrids) so many stations that too few standalones are left to serve the needs of substantial niche audiences." Platform Size and Programming Formats, supra, at 22.

76/ Format heterogeneity maximizes the revenue potential of the industry as a whole. Consumers with intense preferences for only one format may regard radio as having nothing to offer them. They will either underutilize radio (and its advertisers) or not use radio at all. Thus, when the radio stations in a market broadcast several substantial niches, revenue flow into the radio industry as a whole would be maximized.

77/ NPRM at 19882 n. 104.

existence of other stations which could change format may be a check on adverse effects of concentration."[78] Neither assertion is correct. Small operators can seldom afford the transaction costs of changing formats. Many standalone owners chose their formats long before anyone imagined that Congress would authorize eight station platforms. A standalone station owner unfortunate enough to have chosen a format that is vulnerable to adoption by a platform is often doomed if a platform duplicates its format.

A change in station format typically requires at least $10,000 in unrecoverable costs, and $25,000 would not be unusual. In MMTC's experience as a media broker, here are some of the minimum costs attendant to a format change:

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|---|---|
| Market research to select the right new format | 5,000 |
| Buying out contracts of employees unable to work in the new format | 4,000 |
| Penalty for early cancellation of syndicated programming contracts for old format | 1,000 |
| Hiring bonuses and relocation expenses for new employees familiar with the new format | 5,000 |
| Repainting station van | 1,000 |
| Designing and printing new letterhead, logos, giveaway items | 1,500 |
| Supplemental training for sales staff | 2,500 |
| Promotion | 2,500 |
| Retainer for new talent service servicing commercials suitable for the new format | 1,000 |
| Bar tab for nervous investors | 100 |
| Total | $23,600 |

78/ Id. at 19882-83 ¶47.

Even if a format change could be done for just $10,000, and even if the station owner guessed right the first time when it picked the new format, such an expense could mean the difference between profit and loss for the year. It is not uncommon for even a competitive standalone station in a medium market to generate less than $200,000 in gross revenues in a year.79/ That is barely enough to cover the owner's draw, the electric bill, syndication, a salesperson, a couple of parttime announcers, a traffic system, a contract engineer and rent. The idea that such a station can suddenly jump and write a check for $10,000 is absurd.

On the other hand, a platform owner can often change to a new format with ease, causing profound instability and revenue loss to a standalone station occupying that format. Here is a platform owner's budget for a format change:

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79/ Data estimates from Duncan's Radio Market Guide (2001) include a number of examples involving relatively highly ranked facilities. In Macon (2000 ARB Rank 147), the highest billing radio entity is U.S. Broadcasting LP (eight station platform with revenue share 59.8 and $7,700,000 annual revenue), and the fifth largest is David A. Rodgers (AM standalone with revenue share of 1.0 and $130,000 annual revenue). In Erie (2000 ARB Rank 156), the highest billing entity is NextMedia (five station platform with revenue share 57.3 and $5,960,000 annual revenue) and the third largest is Pennsylvania State University (AM standalone with revenue share of 1.3 and $130,000 annual revenue). In Binghamton (2000 ARB Rank 166), the highest billing entity is Citadel (five station platform with revenue share 57.0 and 5,999,000 annual revenue) and the fourth largest is Equinox (FM standalone with revenue share of 1.4 and $150,000 annual revenue). In Montgomery (2000 ARB Rank 142), the highest billing entity is Cumulus (seven station platform with revenue share 50.9 and 8,150,000 annual revenue) and the seventh largest is J&W Promotions (AM standalone with revenue share of 0.8 and $120,000 annual revenue). In Beamount-Port Arthur (2000 ARB Rank 127), the highest billing entity is Clear Channel (four station platform with revenue share of 48.4 and $7,020,000 annual revenue) and the fourth, fifth and sixth largest each are AM standalones with revenue shares of 0.7, 0.7 and 0.6 and annual revenues of $100,000, $100,000 and $90,000 respectively.

| | |
|---|---|
| Market research to select the right new format [that knowledge is generated at corporate by employees on payroll already] | 0 |
| Buying out contracts of employees unable to work in the new format [they can be moved across the hall to another station in the same platform] | 0 |
| Penalty for early cancellation of syndicated programming contracts for old format [there's a quantity discount for this programming, so there is no cancellation fee] | 0 |
| Hiring bonuses and relocation expenses for new employees familiar with the new format [they can be transferred from across the hall] | 0 |
| Repainting station van | 1,000 |
| Designing and printing new letterhead, logos, giveaway items | 1,500 |
| Supplemental training for sales staff [the staff already knows how to sell every mainstream format] | 0 |
| Promotion | 2,500 |
| Retainer for new talent service servicing commercials suitable for the new format [this work is done in-house] | 0 |
| Bar tab for nervous investors | 0 |
| Total | $5,000 |

Even when a standalone station can afford a change in format, it may be unable to make such a change for nonpecuniary reasons. Many standalone operators, particularly minorities, got into radio in order to "do good and do well." Their investors bought stock specifically because they knew the station would be serving the minority community.[80/] Abandoning that core audience could necessitate returning the investment of an outraged original stockholder. A publicly traded company seldom faces this issue.

Consequently, the marketplace for formats operates imperfectly. When a platform operator duplicates a successful format of a standalone, the less well financed standalone almost never wins the competition for advertising dollars. In some formats (such as urban and Spanish) advertisers often only buy one station "deep" in the list of stations in that format. Thus, the station ranking second or third among those in that format often must struggle just to make payroll. In our experience, this scenario too often forces the sale of the standalone station to nonminority owners. The result is less viewpoint diversity and no gain in format diversity.

All of this points again to the recommendation MMTC articulates throughout these Comments: the Commission should strive for a balance between platform owners and standalones, thereby allowing for economic efficiencies, variety and viewpoint diversity.

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80/ A 1996 review by MMTC of the 222 radio stations owned by African Americans in February, 1995 showed that 158 of them, or 71%, programmed formats such as urban, Black talk, or Black gospel that were designed to serve African American populations. (Sources: National Association of Black Owned Broadcasters (February, 1995 roster) and Broadcasting & Cable Yearbook 1995 (February, 1995)). African American radio station owners' desire to serve their own communities is not a stereotype, it is a fact. See Metro Broadcasting, 497 U.S. at 579-84 (discussing the need to demonstrate that race sensitive policies are not based on stereotypical assumptions).

### C. Because Consolidation Tends To Be Irreversible, The Regulatory Response To Consolidation Should Be Measured And Cautious

With one minor exception,81/ over the past two generations there has never been a Commission decision that imposed greater structural regulation on broadcasting. As a practical matter there are only two ways to re-regulate. One is grandfathering -- inherently an undemocratic and inegalitarian reward for having had an ancestor who took advantage of more relaxed rules.82/ The other is divestitures, which are sometimes arbitrary.

Consequently, the regulatory response to consolidation should be measured and cautious. It should strive for an industry with a good balance of platforms and small operators, coexisting in an environment in which both business models can operate successfully.

We comment below on some of the key issues attendant to local radio ownership consolidation.

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81/ See Multiple Ownership of Standard, FM, and Television Broadcast Stations (Second Report and Order), 50 FCC2d 1046, 1084 (1975) ("Multiple Ownership Second Report") (requiring combinations of community's only TV with its only newspaper to be broken up through divestitures).

82/ "Grandfathering" got its name from the "grandfather clauses" used to suppress African American voter participation in the early 20th Century. See Chandler Davidson, Minority Vote Dilution 70 (1984) (explaining that grandfather clauses were one of a number of "disenfranchising measures" aimed at Black voters.) A close relative of grandfathering is "legacy admissions," under which places are reserved at universities for those sharing DNA with the beneficiaries of former, expressly racist admissions policies. Since minorities were virtually excluded from broadcasting for the the industry's first three generations, grandfathering would extend this injustice into succeeding generations. See discussion at pp. 71-104 infra.

### 1. There Is No Substitute For Free, Local, Commercial Radio

The NPRM asks whether other types of media outlets are adequate substitutes for radio.[83/] MMTC adds its voice to those of many other commenters who respond with a resounding no. Owing to its immediacy, receiver portability, and universal free access to consumers, radio broadcasting is indispensable and irreplaceable as a means of serving local communities.

Different media serve different needs. Proponents of "convergence" equate all media, but people use different media in different ways. Free radio is unique in its role in the home, on the road and at the workplace, and it is unique in its power to interconnect all of society.

First, radio is the medium of multitasking -- the only medium which can be enjoyed while doing something else. Like a polite guest, it does not demand our undivided attention. Thus, it is the medium of first resort for factory workers, nurses, filing clerks, washer repairpeople, file clerks at FCC/Capitol Heights, deliverypeople, migrant laborers -- those who do the nation's hard work. And radio is irreplaceable as a means of reaching those in automobiles, and those engaged in recreation.

Second, radio's inexpensiveness and its occasional, albeit inadequate selection of specialized and niche programming make radio an essential connection to the world for racial and language minorities and for the poor. The cost of radio to the consumer --

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83/ Id. at 19875 ¶32.

the mere cost of a receiver -- is far less than the cost of any other medium.

Third, radio is the gateway to all other media. A substantial number of today's leading television and cable personalities, executives and producers began their careers in radio.

Fourth, radio's affordability and accessibility make it by far the most attractive gateway to minority ownership of the media of mass communications.

Compared to TV, cable, newspapers and the Internet, radio has unique attributes: it has the highest percentage of households using the medium (99%), and thus is the only medium that can be relied on to reach the entire nation. It has a very higyh percentage of adults reporting use of the medium (84%, second to television's 94%). It has the highest number of hours per adult per year: 1024, with television's 805 a distant second.[84] Satellite and Internet radio are unlikely to change these statistics in the near or even the middle term.[85]

Any degradation of free radio, including the kind of structural deregulation that diminishes viewpoint diversity, would be unfair to those who place special reliance on the medium -- particularly working people, the poor and minorities. Thus, the

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84/ These statistics are derived from U.S. Census Bureau, Statistical Abstract of the United States: 2000 (U.S. Department of Commerce, 2000), Tables, 17, 722, 909, 910-911, 931, 932, and 937.

85/ As we have shown, neither Internet radio nor satellite radio has profoundly changed the dynamics of the free radio marketplace, any more than cable television in the 1950s profoundly changed the dynamics of the free television marketplace. See pp. 39-40 supra.

Commission should avoid radical, destructive deregulation of the radio industry's ownership structure.

### 2. **Bright Lines Rules Are The "Least Worst" Regulatory Paradigm For Radio**

The NPRM asks whether a bright line rule or case-by-case review is the preferable regulatory paradigm.86/ Both choices are flawed.

Case-by-case review is arbitrary. It promotes subjectivity, defies consistent application, and often leads to regulation by waiver, under which the ceiling usually swallows the floor.87/

Bright line rules are feeble. They often disable the agency from deterring abuses, or from distinguishing between "good" and "bad" consolidation.88/

If the Commission is forced to choose between arbitrary and feeble, feeble deserves to win every time. A bright line rule (assuming the line is really "bright" and not subject to waivers) has the advantage of being easy to understand and less likely to provoke litigation -- a plus for MMTC's constituency of small entrepreneurs. Securing access to capital is difficult enough for small entrepreneurs without piling on the additional costs imposed by delays attendant to case-by-case reviews of transfer and

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86/ Id. at 19886 ¶¶57-58.

87/ All 23 requests to waive the "Top 50 Policy" were granted, compelling the Commission to declare that the policy had been swallowed by its waivers. See Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations) (Report and Order), 75 FCC2d 585, 590 (1979) ("Top 50 Policy Repeal"), recon. denied, 82 FCC2d 329 (1980), aff'd. sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982).

88/ See discussion at pp. 24-28 supra.

assignment applications. Moreover, litigation over subjective standards is an expensive game for which small businesses, consumers and civil rights advocates have few resources and in which they have enjoyed little success. Consequently, bright line rules are usually friendlier to small business and the public, and are more compliant with the goals of Section 257 and the Regulatory Flexibility Act than are rules developed under a case-by-case paradigm.

The NPRM also asks whether a rebuttable presumption that the ownership caps are in the public interest (under the "bright line" paradigm) could lead to inconsistent results based on whether a petition to deny is filed.[89/] The answer is no. The Commission is obliged to review all of the facts presented by an application even if a petition to deny is withdrawn or was never filed at all. If the mere possibility of complaints from the public raised a specter of inconsistent prosecution, then every regulation would be subject to inconsistent prosecution simply because the public does not always succeed in bringing the most egregious matters to the prosecutor's attention.

Finally, the Commission should resist the temptation to combine bright line and case-by-case review, spawning "fuzzy line review" or bright lines with enough wiggle room to accommodate that oxymoron, the "permanent waiver." Such a combination would express the undesirable traits of both parents -- arbitrariness from the case-by-case parent, feebleness from the bright line parent.

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89/ Id. at 19873 ¶27.

### 3. The Commission Should Allow Large Companies To Absorb "Failed" Stations But Not "Failing" Stations

The NPRM asks whether platform owners should be able to absorb "failing stations" or "failed stations" as an exception to the eight station rule.90/ We would counsel against the absorption of failing stations, but would endorse the absorption of stations that have failed so badly that they are dark and cannot restored to the air the current licensee before the license expires.

In its 1999 local television ownership decision, the Commission authorized the formation of duopolies through absorption of a failing station.91/ MMTC regards that as a mistake, but even if it were reasonable for television, it is unreasonable for radio because it is so easily abused in a small balance-sheet business.

As Enron proves every day, creative accounting, done out of the sight of government or the public, can make almost any business appear to be successful. Yet it is even easier to make a business appear to be failing, because accountants' ethics are seldom on the line when they are asked to use the most conservative set of accounting assumptions. Any accountant can make almost any standalone radio station appear to be failing, since a radio station's P&L is usually so small that an adjustment in one or two discretionary items can make a profit look like a loss. For the uninitiated, here is how this is done:

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90/ Id. at 19891-92 ¶75.

91/ Television Local Ownership Order, supra, 14 FCC Rcd at 12938 ¶79 (authorizing otherwise impermissible duopolies "where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance.")

- overcompensating executives and board members
- buying a new company car or van before it is needed
- paying an early round of dividends
- parking key assets in an affiliated partnership
- collecting sure-pay accounts in the next quarter
- writing off slow-pay accounts in the name of "goodwill"
- expensing rather than depreciating new equipment
- buying rather than leasing towers and tower sites
- dispatching executives and staff to nonessential out of town conventions
- funding scholarships for children of station executives
- setting aside an endowment for "golden parachutes."

These techniques would not materially diminish the value of the station to a platform owner, but they would enable a platform owner to go to the Commission, in absolute good faith, and claim that the station is failing and needs to be "rescued."[92/] A large balance sheet business like a television station might find it difficult to make such a claim, but it is easy for most radio stations to do. It would be so easy for a radio station to declare

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92/ The television "failing stations" rule requires that an ostensibly failing station provide an affidavit stating, inter alia, that the only "reasonably available" buyer is the duopolizer. Television Local Ownership Order, supra, 14 FCC Rcd at 12939 ¶81. The rule does not require that small companies be contacted with an offer to merge and form a stronger company. Instead, the rule only requires that an "independent broker" must state that "active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received." Id. Anyone can pass that test.

itself failing that a "failing station" exception to the ownership rules would swallow the rule.93/

A "failing station" exception would bad policy even if it weren't so easy to manipulate. Many distinguished and successful companies in radio today would have qualified as "failing" in their early days -- including ABC, Radio One, Cumulus and Big City. Fortunately, we did not lose these companies to a "failing station" exception to the multiple ownership rules.

A weak competitor should not always be sacrificed to the biggest bidder. Instead, such a company should be encouraged to join forces with another weak competitor and thereby create a strong competitor. Although many small stations are under great pressure to sell out to platform owners, the Commission should resist the urge to incentivize even more consolidation in this way.

The equities on "failed" stations cut in the opposite direction. Platform owners, like other broadcasters, should be allowed to pick up dark stations that are in danger of exceeding the one-year off-air limitation that would lead to forfeiture of their licenses.94/ Thus, a "failed station" policy would be analogous to the policy objectives of Section 202(b)(2) of the Act, which contemplates that platform owners should be allowed to absorb facilities where the result would be putting a new station

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93/ A station may genuinely "fail" because a platform owner has targeted it for destruction through such entirely legal means as duplicating its format, offerings its advertisers very low-cost spots, or hiring away the target station's key talent. It would be the height of irony to allow the very company that forced a station to fail to be rewarded with the failed station's FCC license.

94/ 47 C.F.R. §73.1750.

on the air.[95] A "failed station" policy would also be harmonious with the Commission's tradition of mercy for the failed station's stockholders when the company genuinely faces ruin.[96]

### 4. Divestitures Should Not Be Required Under Distress Conditions

When platform owners agree to a merger that would place them over an ownership cap, the Commission typically waives the rules to allow some reasonable amount of time to close the sale of spinoff properties. The length of the waiver period is the subject of such transparent FCC lore that almost anyone can break the code: a waiver of six months is expected to result in a quick sale, and a waiver of eighteen months sometimes would not result in any sale at all because the underlying ownership cap is going to be relaxed.

Twelve months should be the standard waiver period. Six months is almost never enough time in today's market to sell a radio station without either receiving a distress price or being able to consider only the bids of members of the small fraternity of other platform owners that can readily pay cash. Six month waivers are antithetical to diversity because most small and minority entrepreneurs cannot raise capital that quickly.[97]

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95/ See discussion of Section 202(b)(2) at pp. 158-61 infra.

96/ See, e.g., Second Thursday Corp. (Reconsideration), 25 FCC2d 112 (1970) (allowing sale of bankrupt station after designation for hearing, where wrongdoers do not profit from sale).

97/ See, e.g., Midwest Communications, Inc., 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities). While large companies often can buy stations by writing a check, a small entrepreneur typically must secure commitments from several sources

(n. 97 continued on p. 55)

Longer waiver periods enable platform owners to afford small and minority entrepreneurs a meaningful opportunity to bid.[98]

In the current marketplace, it is daunting for any entrepreneur to raise capital quickly, and it is especially difficult for minorities to do so.[99] The difficulty faced by

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97/ (continued from p. 54)

-- control group equity holders, passive investors mezzanine money, senior debt and subordinated debt. The time required to assemble such a package is the time it takes the slowest of these contributing sources to process its paperwork and make a decision.

98/ See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as part of CBS' showing in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity "has already filed an application to assign one of the stations it will divest to a minority-controlled entity"); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount "would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver"); Combined Communications Corp., 72 FCC2d 637, 656 ¶45 (1979) (declaring that the opportunity to approve the spinoff of WHEC-TV, Rochester, NY from the Gannett/Combined Communications Corp. merger to a minority owned company "represents a most significant step in the implementation of our continuing effort to encourage minority ownership of broadcast properties.")

99/ See Mark R. Fratrik, "The Present Difficulty in Selling Radio and Television Stations," BIA Financial Network, October 17, 2001, appended as Attachment 27 to the Cross-Ownership Showing in the Applications for Transfer of Control of The Ackerley Group, Inc. from the Shareholders of Ackerley to Clear Channel Communications, Inc., File Nos. BTCCT-20011017aci et al. at 8. Fratrick accurately points out that "banks now are only lending up to five times the station's cash flows where previously that maximum amount was six times" and adds:

> Where this lack of funding is most problematic is the funding of new companies, some headed by minorities and women, which do not have the "track record" of success. Without some examples of successfully acquiring and running stations, these individuals will have the most difficulty in securing needed financing during this period of added uncertainty.

Id. at 8-9.

minorities in securing access to capital was confirmed by a recent and authoritative study commissioned by the FCC.[100] Minorities' lack of access to capital is so well documented that it may be the subject of official notice.[101]

Traditionally, spinoffs of stations from major merger transaction have presented many of the best opportunities for minorities and new entrants to acquire quality facilities with full coverage signals. For example, in connection with mergers in 1997

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100/ William Bradford, "Study Of Access To Capital Markets And Logistic Regressions For License Awards By Auctions," University of Washington (2000). Using regression analysis, Dr. Bradford examined the capital market experiences of current broadcast license holders with respect to race, gender, the year of application or acquisition, business cash flow, equity, and size of firm (full time employees). Dr. Bradford found that minority broadcast license holders were less likely to be accepted in their applications for debt financing, after controlling for the effect of the other variables on the lending decision. Minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables.

101/ See National Telecommunications and Information Administration, U.S. Department of Commerce, Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States (December, 2000) at 45-46. Minorities often experience artificial barriers to obtaining credit or financing. 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 (1995) (documenting artificial barriers faced by minorities in obtaining credit or financing for communications ventures). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Fifth Report and Order), 9 FCC Rcd 5532, 5573 ¶98 (1994) (discussing the "important and highly-publicized" 1992 study by the Federal Reserve Bank of Boston that concluded that an African American or Hispanic applicant in the Boston area is roughly 60% more likely to be denied a mortgage loan than a similarly situated White applicant); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 852-53 (1982) ("1982 Minority Ownership Policy Statement") (authorizing the use of limited partnerships as capital formation tools in conjunction with the then-extant minority ownership policies).

and 1999, Infinity Broadcasting Corp. spun off five large market radio properties to minorities, with two more pending. And in connection with mergers in 1998 and 2000, Clear Channel Communications spun off 49 radio properties to minorities. The stations involved in those four transactions that minorities still own constitute approximately 7% of all minority owned and controlled radio stations, and we estimate that they account for about 20% of the total asset value of all minority owned radio properties. Most notably, this was all achieved voluntarily in fair market transactions.

A systematic, openly articulated policy that no waiver period will be shorter than twelve months would encourage lenders and investors to finance small and minority entrepreneurs. Such a policy would also be consistent with Section 257 by reducing a well known and particularly egregious market entry barrier.102/

### 5. The Commission Should Propose Tax Incentives That Foster Both Competition And Viewpoint Diversity

The NPRM asks how the Commission should dispose of existing combinations that would not comply with the rules.103/ The best

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102/ A close analogy is found in the Commission's 1981 decision to repeal the grossly unrealistic Ultravision Rule. In Financial Qualifications Standards, 87 FCC2d 200 (1981), the Commission repealed the requirement that a construction permit applicant have reasonable assurance of financing to cover a year of no-revenue operation. See Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision"). In adopting a more realistic three month reasonable assurance period, the Commission held that the one-year standard "conflict[ed] with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses." Financial Qualifications Standards, supra, 87 FCC2d at 201.

103/ NPRM at 19888 ¶65.

approach is to restore the policy that formerly allowed for capital gains deductions where a sale fostered competition and diversity. As noted in the previous sections, sufficient time should be allowed for divestitures in order to afford minority an opportunity to secure the capital needed to acquire the divested properties.

In 2000, the Commission recommended to Congress just such a tax incentive program. It would

> permit[] deferral of taxes on any gain from the sales of telecommunications businesses to small telecommunications firms, including disadvantaged firms and firms owned by minorities or women, as long as that gain is reinvested in one or more qualifying replacement telecommunications businesses. 104/

The Commission should reemphasize to Congress the desirability of rapidly adopting this approach.

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104/ Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15445 ¶184 (2000).

## III. Consolidation's Likely Impact On Minority Entrepreneurship And Employment In Radio

In the conclusions to his study on Consolidation and Minority Ownership (Appendix 1 to these Comments), Kofi Ofori sets out the current status of minority media ownership:

- Between August, 1997 through December, 2001, the number of stations owned by privately held minority owned companies increased from 367 to 399. 105/
- The number of privately held minority owners decreased from August, 1997 to December, 2001 from 169 to 149 -- from a high point of 173 in 1991. 106/
- As the number of privately held minority owners declined, the average number of stations owned by each owner increased from 1.48 in 1991 to 2.68 in 2001. 107/
- In local markets the number of minority owners declined from 1.42 owners per market in 1997 to 1.19 owners per market in 2001. Thirty-six minority owners, accounting for 655 stations in August 1997, left the industry before December, 2001, and many of them attributed their departure to consolidation. 108/
- In August, 1997, there were no publicly held broadcast licensees controlled by minorities. By December, 2001, there were four such firms owning a total of 156 stations. These firms are Entravision (52 stations), Radio One (63 stations), Radio Unica (16 stations) and Spanish Broadcasting System (26 stations). 109/
- Much of the increase in minority ownership can be attributed to spinoffs from a single transaction, the 1999 Clear Channel acquisition of AM-FM. As of December, 2001, 30 stations sold to minorities in that transaction are still owned or controlled by minorities. 110/

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105/ Consolidation and Minority Ownership, supra, at 10.

106/ Id.

107/ Id.

108/ Id. at 11.

109/ Id. at 12.

110/ Id. at 11-12.

Based on his analysis of the operational success of minority owned and controlled stations relative to majority owned stations, Ofori concludes:

> Based upon several performance measures, minority stations have not realized the same economic potential realized by majority stations. This pattern holds true for the present as well as the time frame immediately following passage of the 1996 Telecommunications Act. Stations owned by minority firms that are publicly traded also perform at levels below their majority counterparts. While these trends continued throughout the period of increased ownership consolidation, the data does not necessary link station underperformance with ownership consolidation. Further research should be undertaken to compare present data on station performance with data prior to the relaxation of the numerical limits.
>
> Secondly, other variables, in addition to ownership consolidation, may have adversely affected station performance (e.g. discriminatory advertising practices and lack of capital). However, the data does suggest that ownership consolidation has resulted in the decline in the number of minority owners - a development that commenced with the relaxation of the numerical limits. The fact that the number of minority owners remained level from 1990 until the passage of the 1996 Act and then sharply declined is of particular significance and should be of concern to the Commission. The author recommends that further research examine:
>
> - The factors associated with the departure of certain owners from the marketplace;
> - The market circumstances under which new competitors entered the market;
> - The factors that enabled certain firms to go public and prevented others from going public;
> - The extent to which access to equity capital and other factors have enhanced the ability of minority-controlled firms to compete against majority group owners.
>
> The relatively superior performance of four minority-controlled firms, that own 156 stations, suggests that access to equity capital has been a significant factor in their ability to compete. On the other hand, other broadcasters, such as Multicultural Radio with 29 stations and a wide variety of program formats, have also been able to rapidly acquire new stations in major markets without the assistance of Wall Street. This apparent paradox has not been examined by this study. Given that it has been firmly established by other studies that minority broadcasters contribute

> significantly to diversity of viewpoints, it would advance public policy to take further steps in another forum to gain a better understanding of station underperformance and superior performance on the part of minority competitors. 111/

Although the number of minority owned stations has increased, almost all of the increase has come about because four minority controlled companies are publicly traded and thus have competitive access to capital. These gains were offset by the loss of 20 minority owned companies from 1997 to 2001. Some of those companies left the industry by merging with others, and some may have left because they could not attract outstanding management. But many others were capably run, and would have remained in the industry had they had an opportunity to compete. By losing these companies, the industry has suffered a significant loss in intellectual and cultural diversity.

Between 1996 and 2001 minorities caught some lucky breaks: a growing peacetime economy, equity funds designed to promote minority ownership, and management of the largest platform owners by leaders committed to promoting minority ownership. These factors surely helped offset and even reverse some of the pressure on minority ownership that is traditionally generated by consolidation, inasmuch as there is nothing inherent in the nature of a consolidating market that promotes minority or small business ownership.

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111/ Id. at 26-27.

There is no guarantee the growth in minority ownership will continue indefinitely. Indeed, the opposite is likely to occur if consolidation is allowed to continue unabated. In most industries, as consolidation proceeds, eventually there simply are no more assets left in play for which small and minority entrepreneurs can bid competitively against larger companies.

Consolidation surely has had one unfortunate side effect that inhibits future gains in minority ownership: it has stopped the growth of broadcast employment.[112/] Larger platforms save operating expenses through such means as voicetracking and by combining their stations' news, traffic, engineering, sales, traffic, and back office functions. These trends reflect rational business decisionmaking, but their result is that many highly skilled employees chase an ever-shrinking supply of the jobs that remain. As a result, those new to (and formerly excluded from) broadcasting have few opportunities to build their careers.[113/]

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112/ According to the Commission's annual broadcast employment databases (maintained from 1971 through 1997), there were 153,058 fulltime broadcast employees in 1995 but only 149,975 in 1997. FCC, 1997 EEO Trend Report (June 6, 1998) at 756. See also John M. Higgins, "Media's pink slip blues," Broadcasting and Cable, January 28, 2002, pp. 30, 31 (according to U.S. Bureau of Labor Statistics data, radio employment declined 0.4% in 1999, increased 0.4% in 2000 and decreased 0.4% in 2001).

113/ From 1998-2001, MMTC produced approximately ten job fairs per year throughout the country to help newcomers to radio gain initial employment. Our average attendance was over 250. At our last six job fairs, we gave each registrant a pre-stamped postcard to return if she got a job. Not a single card came back with confirmation of a hire. Apparently there were only a handful of jobs relative to the number of applicants.

Incumbent employees realize that if they lose their jobs, there will be fewer employers in town to approach for a job, and those few employers will have fewer jobs available at any rate of pay. Minorities, who typically lack the job tenure of other employees, inevitably face the phenomenon of "last hired, first fired" and thus will be disproportionately impacted by the job shrinkage attendant to consolidation.

Nothing inherent in the nature of consolidation will bring about more minority ownerhsip. In the long run, unregulated consolidation inevitably forces out most minority entrepreneurs and creates new barriers to entry in ownership and employment. The fact that minorities have not suffered a rout in the past six years is a testamant to the strength of programming formats often used by minorities,[114/] the goodwill of industry leaders, and most of all the skill and endurance of minority owners.

The bottom line is that the 1996-2001 increase in minority owners' share of industry asset value from about 0.8% to 1.2% is no reason to declare victory and withdraw the regulatory troops. By 1863, the Union Army had brought about a comparable increase in the percentage of former slaves who could read. Fortunately, President Lincoln did not stop there.

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114/ See Platform Size and Program Formats, *supra*, pp. 21-22.

## IV. Structural Regulation and Minority Ownership

### A. The Commission Can Deploy Its Rulemaking Power To Advance Minority Ownership

The Commission has the power to promote minority ownership through its supervision of allotments and licensing. As early as 1975, the D.C. Circuit first instructed the Commission to consider the effects of its spectrum management policies on minority access to the airwaves.115/

The Commission's best known effort to directly promote minority ownership through structural regulation took place in 1985. The previous year, over the strenuous opposition of the nation's civil rights organizations, the Commission increased national radio and TV ownership caps from 7 AM, 7 FM and 7 TV ("7-7-7") to 12 AM, 12 FM and 12 TV ("12-12-12").116/ Congressman Mickey Leland, a member of the House Communications Subcommittee, pointed out that this higher level of consolidation would inhibit minority ownership. The Commission reconsidered its plan, and improved the rule by providing that a company owning 12 AM, FM or TV stations could also hold a minority interest in a 13th or 14th

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115/ Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) ("Garrett").
An early but short-lived effort to promote minority ownership through structural regulation occurred in Clear Channel Broadcasting in the AM Broadcast Band, 78 FCC2d 1345, 1368-69 (1980) ("Clear Channels"), in which the Commission made minority ownership one of the criteria for acceptance of certain applications for new service on the domestic Class I-A clear channel AM stations. Five years later, after the new rule spawned about three minority owned stations, the Commission repealed Clear Channels. Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules (Report and Order), 102 FCC2d 548, 558 (1985) ("Clear Channels Repeal"), recon denied, 4 FCC Rcd 5218 (1989).

116/ Multiple Ownership of AM, FM and Television Broadcast Stations (R&O), 100 FCC2d 17 (1984).

station that was controlled by entrepreneurs of color.[117] In 1994, the Commission revised the Mickey Leland Rule to permit minorities to own up to 25 AM and 25 FM stations (five more per service than the then-applicable 20-20 national cap).[118] Although the "Mickey Leland Rule" yielded only modest benefits (having been used by only four companies until it was rendered moot by the 1996 Act), the Commission had the right idea when it experimented in this way. Now that the Commission is almost without other tools to promote minority ownership, it should take a fresh look at opportunities to promote minority ownership through structural regulation.

### B. The Statutory Ownership Caps Must Be Read Together With Congress' Instructions To Ban Discrimination And Eliminate Market Entry Barriers

Section 202(b) was not the only provision of the Telecommunications Act relevant to diversity and competition in radio. Most notably, Congress amended Section 151 of the Communications Act to provide that the Commission was created

> [f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, <u>without discrimination on the basis of race, color, religion, national origin, or sex</u>, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service... (new 1996 language emphasized).

Furthermore, in Section 257 of the Telecommunications Act, Congress directed the Commission to complete a proceeding "for the

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117/ <u>Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on Reconsideration)</u>, 100 FCC2d 74, 94 (1985) (holding that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.")

118/ <u>See</u> <u>Revision of Radio Rules and Policies (Second MO&O)</u>, 9 FCC Rcd 7183, 7191 (1994).

purpose of identifying and eliminating...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services...."119/ Section 257 establishes a "National Policy" under which the Commission shall promote "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity."120/ Congress also expects the Commission to report, every three years, on "any regulations prescribed to eliminate barriers within its jurisdiction...."121/

Section 257 was drafted with the promotion of minority ownership in mind.122/ Thus, Section 257 analysis has often been a key linchpin of Commission rulemaking decisions on issues that directly impact minority participation in the industries it

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119/ 47 U.S.C. §257(a). The Commission did complete that proceeding. Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd 16802 (1997).

120/ 47 U.S.C. §257(b).

121/ 47 U.S.C. §257(c).

122/ Congresswoman Cardiss Collins, a sponsor of Section 257, offered this interpretation of the Section:

> [W]hile we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely under represented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

regulates -- including equal employment opportunity, minority media ownership, and structural regulation of such critical industries as television and wireless telephony.123/

As the steward of valuable public property, the Commission has a deep moral duty to measure, and then remedy any consequences of its own involvement in past discrimination, as discussed infra. By embracing Section 151 and Section 257 analysis in this proceeding, the Commission can reaffirm that when talent and brains, and not historic barriers, govern one's opportunity to compete, consumers ultimately will enjoy optimal levels of diversity and competition.

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123/ See, e.g., Review of the Commission's Broadcast and Cable Equal Employment Opportunities Rules and Policies (Report and Order), 15 FCC Rcd 2329, 2350 ¶48 (2000) ("2000 EEO R&O"), reversed on other grounds in MD/DC/DE Broadcasters, supra (in adopting new broadcast and cable EEO regulations, Commission noted that Section 257(b) identifies "diversity of media voices" as one of the "policies and purposes" of the Communications Act); Television Local Ownership Order, supra, 14 FCC Rcd at 12913 ¶21; 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (Report and Order), 13 FCC Rcd 23056, 23095-98 ¶¶96 (1998) (deciding to collect data on broadcast owners' gender and race in order to "determine accurately the current state of minority and female ownership of broadcast facilities, determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257...."), recon. denied on this issue (and granted in part on other issues), 14 FCC Rcd 17525, 17530 ¶17 (1999); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems (Second Report and Order and Further Notice of Proposed Rulemaking), 12 FCC Rcd 2732, 2809 ¶168 (1997) ("Paging Systems Second Report") (declaring goals of Section 257 are fostered by system of bidding credits, installment plan and geographic area partitioning); Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation (Second Report and Order), 12 FCC Rcd 2705, 2714-15 ¶19 (1997) (shortening voluntary negotiation period for entrepreneurs' "C block" winners in order to "assist small businesses in C block to deploy service to the consumer faster.")

### C. **Minority Ownership Policies Have Multiple Compelling Justifications**

Efforts to promote minority ownership will be subject to constitutional oversight in two ways: to determine whether they are race-conscious, and if they are, to determine whether they serve compelling governmental interests and are narrowly tailored to serve those interests.[124]

The Supreme Court held in Adarand III that any federal program that uses racial criteria as a basis for decisionmaking must satisfy "strict scrutiny"; that is, it must serve a compelling governmental interest and must be narrowly tailored to serve that interest.[125] Four of the Commission's regulatory goals could satisfy strict scrutiny: preventing discrimination, remedying the consequences of past discrimination, promoting economic competition, and promoting viewpoint and source diversity.

#### 1. **Minority Ownership Policies Can Help Prevent Discrimination In The Ownership Arena**

If discrimination is worth preventing in employment,[126] it is critical that it be prevented in ownership. People spend decades

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124/ Adarand III, supra, 515 U.S. at 200.

125/ The Court has also held that gender based classifications need only meet a more relaxed (although still difficult to satisfy) standard known as intermediate scrutiny. See United States v. Virginia, 518 U.S. 515, 531-33 (1996). Since strict scrutiny is a higher standard than intermediate scrutiny, Commission programs which satisfy strict scrutiny will encompass the requirements of programs serving both minorities and women.

126/ See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second NPRM), 16 FCC Rcd 22843, 22858 ¶53 (2001) ("[i]t is not enough to say that one will not discriminate against those who apply for a job when not all have been given a fair opportunity to apply" (fn. omitted)).

preparing for the day when they can become owners. To find the door blocked even by unconscious prejudice is unconscionable.

In the employment context, it is black letter law that word of mouth recruitment performed by members of a racially homogeneous staff is inherently discriminatory.127/ If broadcast employment is close-knit, broadcast ownership is waterproof fabric. While broadcast employers deal directly with job seekers, broadcast owners interpose a layer of protection -- brokers, MMTC among them.128/ Among our responsibilities is making sure that those sure to be ready, willing and able to close a transaction know that a property is for sale, and to be sure that tire-kickers and competitors eager for proprietary information do not know. Most brokers consciously avoid race discrimation, but, candidly, some brokers unconsciously and erroneously assume that minorities would be uninterested in or unable to bid on certain types of properties, such as medium and small market stations with (e.g.)

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127/ See, e.g., Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) ("[c]ourts generally agree that, whatever the benefits of nepotism and word-of-mouth hiring, those benefits are outweighed by the goal of providing everyone with equal opportunities for employment.") See also Jacor Broadcasting Corp., 12 FCC Rcd 7934, 7939 ¶14 (1997) (Commission was "troubled that a significant number of the stations' hires, for which recruitment efforts were made, resulted from staff or client referrals" (fn. omitted)); Walton Broadcasting, Inc., 78 FCC2d 857, 865. 875, recon. denied, 83 FCC2d 440 (1980) (condemning "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referrals from a predominately white work force, which, while unintended, effectively discriminated against minority group employment.")

country-western formats. Hispanic broadcasters, too often, are only notified when Spanish language stations are being offered for sale. Too often, even now, minorities learn of desirable transactions only when their completion is announced in the trade press.

Assuming that a narrowly tailored program can be devised, no one can seriously contend that that the government's interest in preventing discrimination in the disposition of public assets is not a compelling one.[129/] Congress made this easy: in the first section of the Communications Act, Congress directed the Commission to prevent discrimination.[130/]

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128/ The role of brokers in broadcast transactions is well known. Unfortunately, brokers helped kill Commissioner Hooks' 1978 proposal for a 45 day period during which the sale of a broadcast station would be widely publicized in order to prevent discrimination. See Public Notice of Intent to Sell Broadcast Station, supra.

129/ See Roberts v. United States Jaycees, 468 U.S. 608, 628 (1984) ("acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent[.]") In MD/DC/DE Broadcasters, supra, 258 F.3d at 21, the court did not reach the question of whether preventing discrimination is a compelling governmental interest, finding instead that the means proposed by the FCC's 2000 EEO rules were not narrowly tailored.

130/ 47 U.S.C. §151, as amended in 1996, requires the Commission to "regulat[e]...so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service....")

### 2. Minority Ownership Policies Help Remedy The Consequences Of Past Discrimination

In the Section 257 Inquiry, the Commission acknowledged that discrimination can be a market entry barrier.131/ Further, the Supreme Court has found that the governmental interest in remedying past discrimination can meet the compelling interest standard.132/ That interest permits an agency to remedy the consequences of its own discrimination, and of its ratification, validation and facilitation of discrimination. Race-conscious remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of prior discriminatory conduct.133/

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131/ See Section 257 Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6282-83 ¶3 (1996) ("Section 257 Inquiry").

132/ See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) ("Croson"), finding that in order to establish a compelling interest, the government must show "a strong basis in evidence for its conclusion that remedial action (i)s necessary" (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) ("Wygant")). The Croson court also held that a government actor may not rely on general societal discrimination in order to justify a race conscious program. Id. at 499. Instead, the government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a "passive participant." Id. at 492 (plurality opinion). The governmental actor must possess evidence that its own practices were "exacerbating a pattern of prior discrimination," and must "identify that discrimination, public or private, with some specificity," to establish the factual predicate necessary for race conscious relief. Id. at 504. Justice O'Connor's majority opinion in Adarand III recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand III, supra, 515 U.S. at 237.

133/ Adarand III, supra, 515 U.S. at 269 (Souter, J., dissenting) ("[t]he Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power

(n. 133 continued on p. 72)

Not only _can_ the Commission remedy the consequences of its ratification of its licensees' discrimination, it _must_ do so. Today's absurdly low level of minority ownership is the fault of (1) the Commission's assistance to segregated state university systems as they excluded minorities from broadcast education; (2) the Commission's licensing and relicensing of open segregationists and employment discriminators; (2) the Commission's use of absurdly stringent financial qualifications requirements, as well as broadcast experience and past broadcast record as licensing criteria, even though discrimination had excluded minorities from broadcasting and from access to broadcast capital; (4) the Commission's failure to ensure minorities' access to radio

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133/ (continued from p. 71)

to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.") A prior judicial, administrative, legislative determination of discrimination by the government is not required before the government may voluntarily choose to use affirmative action efforts. _Croson_, _supra_, 488 U.S. at 500. However, an agency must have a "strong basis in evidence," for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others and that a race-conscious remedial effort is appropriate. _Id._ at 500, _quoting Wygant_, _supra_, 476 U.S. at 277; _see also Peightal v. Metropolitan Dade County_, 26 F.3d 1545, 1553 (11th Cir. 1994); _Concrete Works v. City and County of Denver_, 36 F.3d 1513, 1521 (10th Cir. 1994), _cert. denied_, 514 U.S. 1004 (1995); _Donaghy v. City of Omaha_, 933 F.2d 1448, 1458 (8th Cir.), _cert. denied_, 502 U.S. 1059 (1991), _O'Donnell Constr. Co. v. District of Columbia_, 963 F.2d 420, 424 (D.C. Cir. 1992); _Stuart v. Roache_, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); _Cone Corp. v. Hillsborough County_, 908 F.2d 908, 915 (11th Cir.), _cert. denied_, 498 U.S. 983 (1990). This does not mean that an agency must admit that it discriminated, either intentionally or inadvertently, before adopting remedial measures. _See Johnson v. Transp. Agency_, 480 U.S. 616, 652-53 (1987) (O'Connor, J, concurring); _Wygant_, _supra_, 476 U.S. at 290 (O'Connor, J. concurring).

allotments with adequate technical attributes, and (5) the Commission's failure to prevent employment discrimination. Antoinette Cook Bush and Marc S. Martin explain:

> the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses exclusively to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an <u>inherent bias in favor of nonminorities until reforms were finally adopted in 1978</u> (fns. omitted; emphasis supplied). 134/

The Commission's deliberate misconduct and studied indifference was a constitutional tort of the highest order.

Congress created the Commission to serve as a public trustee for the nation's airwaves. This trusteeship is expressly tied to the assurance of nondiscrimination.135/ As public trustees, broadcasters are given an exclusive opportunity to use and exploit a scarce and valuable public resource.136/ In exchange for this

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134/ A. Bush and M. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 <u>Federal Comm. Law Journal</u> 423, 439 (1996) ("<u>Bush and Martin</u>").

135/ <u>See</u> 47 U.S.C. §303(g) (1934) (under which the Commission is expected to provide for the "larger and more effective use of radio in the public interest"); 47 U.S.C. §151 (1934) (providing that the Commission was to ensure the delivery of wire and radio service "to all the people of the United States"); 47 U.S.C. §151 (1996) (eliminating any doubt about who "all the people" are by adding the words "without discrimination on the basis of race, color, national origin, religion or sex" to Section 151.)

136/ <u>See</u> <u>Red Lion Broadcasting v. FCC</u>, 395 U.S. 367 (1969) ("<u>Red Lion</u>").

privilege, broadcasters must serve "the public interest, convenience and necessity" in operating their stations and in airing programming.137/ Because the spectrum is a scarce resource, the Commission was permitted to place "restraints on licensees in favor of others whose views should be expressed on this unique medium."138/

As early as 1943, the Supreme Court reaffirmed that the Commission's primary role in regulating the broadcast spectrum was to "secure the maximum benefits of radio to all the people of the United States."139/ The Court, however, recognized that the radio spectrum was not expansive enough to accommodate everyone. Accordingly, the Commission was authorized to limit who gained access to the spectrum.140/

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137 Charles Logan, "Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation," 85 Calif. L. Rev. 1687, 1688 (1997).

138/ Red Lion, supra, 395 U.S. at 388, 389. No one doubts that the spectrum is finite, or that that many more entities wish to use it than can be accommodated, or that oligopoly rents inure to those occupying it. Recently the D.C. Circuit declined an invitation to speculate that Red Lion is not good law. Fox Television Stations, Inc. v. FCC, No. 00-1222, 2002 U.S. App. Lexis 2575 (D.C. Cir., decided February 19, 2002) ("Fox Television") at 42-43. Indeed, by far the greatest portion of the appraised and sale value of most broadcast stations is the intangible value of the broadcast license.

139/ NBC v. United States, 319 U.S. 190, 217 (1943).

140/ FCC v. NCCB, 436 U.S. 775 (1978); Red Lion, supra, 395 U.S. at 389-90.

Unfortunately, in exercising this power, the Commission discriminated or ratified and facilitated the discrimination of others. It thus denied minorities the enjoyment of their liberty interest in using the spectrum.

As the only body that controlled access to the spectrum, the Commission's arbitrary actions depriving minorities of access to the spectrum stigmatized minorities and created a disability that is difficult to repair. That disability includes the right to speak in the public forum of broadcasting and the right to "work for a living in the common occupations of the community."141/ By validating the intentional, de facto and sometimes de jure discrimination of its licensees, the Commission engaged in the constitutionally impermissible deprivation of a liberty interest in violation of the Due Process Clause.142/

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141/ Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972). The right to work is "the very essence of personal freedom and opportunity that was the purpose of the 14th Amendment to secure." Id. This personal freedom is also defined as a liberty interest: "the right...to engage in any of the common occupations of life, to acquire useful knowledge. [I]n a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad." Id.

142/ See Matthews v. Eldridge, 424 U.S. 319 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

### a. The Commission Conspired With State Governments To Award Licenses To Segregated Institutions And Prevent Minority Schools From Securing Broadcast Licenses

The story of how government actors facilitated discrimination in broadcasting is not pretty. Perhaps the best example of this discrimination is found in noncommercial broadcasting, one of whose functions has long been service as a training ground for those seeking careers in commercial broadcasting.

For two generations the Commission routinely assisted in state schemes to discriminate against historically Black, Hispanic and Native American colleges in noncommercial station employment and in noncommercial station licensing. The Commission did nothing to counter its noncommercial licensees discrimination, even though its character qualifications standards should have prevented the licensing of discriminators. By systematically awarding licenses and license renewals to segregated and discriminating noncommercial licensees, two generations of minorities were denied access and opportunity to obtain the education, experience, exposure and contacts needed to succeed in the broadcast industry.

Minorities in many states were barred by state law or custom from attending universities that operated their communities' only FCC-licensed educational TV and radio stations. Nonetheless, the Commission routinely provided, then routinely renewed broadcast licenses for segregated educational institutions, guaranteeing that a generation of trained broadcast employees would be Whites only.[143] Furthermore, the Commission did not even bother to inquire whether the schools had complied with the 1896 Supreme Court requirement that facilities could be separate but must (supposedly) be equal.[144]

Nowhere is there a reported case in which the Commission inquired of any educational institution why minorities could not attend the school and enjoy the use of the school's FCC-licensed broadcast station. Nor is there any record of the Commission even

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143/ Examples include KASU-FM, Arkansas State University, licensed in 1957; WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1958. There were many others. A 1995 comparison by MMTC of 28 HBCUs' stations and those belonging to the 29 predominantly White state colleges in the same states is quite dramatic. The White schools' stations average signon year was 1970; the HBCU's average signon year was 1980. The White schools' stations mean power level was 40.57 kw, 20% more than the HBCUs' stations' mean power level of 33.8 kw. The White schools' mean HAAT was 671.4 feet, almost 2 1/2 times the HBCUs' stations' mean HAAT of 273 feet. Thus, the HBCUs were given a late start, after which they received second class broadcast facilities.

Documentation of HBCUs' late start in broadcasting may also be found in William Barlow, Voice Over: The Making of Black Radio (1999), p. 280 ("Voice Over"). Barlow describes how only two HBCU stations signed on before 1969: ten-watt (and thus non-CPB qualifying) WESU-FM at Central State University in Wilberforce, Ohio (1962), and KUCA-FM at the University of Central Arkansas (1966). During the 1960s and 1970s, 20 more Black college stations signed onto the air, but most of them "were low-budget and low-power operations that did not initially qualifiy for CPB's radio grants and were funded by the colleges' academic budgets." Id.

144/ Plessy v. Ferguson, 163 U.S. 537 (1896) ("Plessy"). Before Brown v. Board of Education, 347 U.S. 483 (1954) ("Brown I") overruled Plessy, the Supreme Court had interpreted Plessy as requiring states that provided separate facilities either to equalize them, or if that wasn't possible, to integrate them. See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950) (holding that in order to educate a law student, a state must permit him to sit in a classroom and engage in dialogue with other law students of different backgrounds).

inquiring whether a state or its system of colleges had attempted even to provide ostensibly "separate but equal" facilities for minorities at its state-run HBCUs. Thus, the Commission either deliberately afforded state segregation laws precedence over the nondiscrimination requirement of Section 151 of the Communications Act -- a bizarre inversion of McCulloch v. Maryland,145/ -- or it was acting on an astonishing misreading of the Communications Act as being in harmony with state segregation laws.

The Commission's complicity with state-sponsored discrimination in public broadcasting continues to this day. The Commission routinely renews the licenses of every educational broadcaster in the country without even asking whether its academic resources have been apportioned without discrimination by its parent licensee.146/

**b. The Commission Granted And Renewed Licenses Of Intentional Discriminators, Thereby Making Possible Their Suppression Of Minority Broadcast Participation**

For two generations, the Commission routinely granted, then renewed without investigation, the licenses of commercial stations owned by open segregationists -- companies the Commission knew were

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145/ 4 Wheat. 316, 421, 4 L.Ed 579 (1822).

146/ In the higher education context, "even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior de jure segregation and that continues to foster segregation. The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.' Lane v. Wilson, 307 U.S. 268 (1939). If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices" (emphasis in original). Ayers v. Fordice, 505 U.S. 717, 729 (1992).

engaging in deliberate employment discrimination.147/ By enabling commercial broadcasters to discriminate freely and still keep their broadcast licenses, the Commission helped ensure that almost no broadcast jobs would be available to minorities. Minorities' lack of broadcast experience and a track record in broadcast ownership prevented them from acquiring their own licenses.148/ Furthermore, since minority colleges and universities knew that there were no jobs in the industry for their graduates, these schools were inhibited for years from establishing broadcasting programs that could have provided minorities the training they could not receive from noncommerical broadcasters149/ and from commercial

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147/ As an expert agency, the Commission is presumed to be familiar with the fundamental policies of its licensees. FCC commissioners regularly speak to state broadcast associations. Some commissioners must have noticed that no minorities attended these meetings. They must have noticed, when visiting licensees' facilities, that no minorities worked there. They certainly must have noticed that, until Newton Minow, Ken Cox and Henry Geller got their hands on the problem, the Commission's own staff was all-White except at the secretarial and janitorial levels. That couldn't have happened unless the regulated industry and the broadcast training schools, from which the Commission then drew the bulk of its staff, were segregated, or unless the Commission itself discriminated in employment, or both. Of course the Commission had endured its own entanglements with segregationists, so it truly knew the character of the institutions it licensed. See Erik Barnouw, The Golden Web: A History of Broadcasting in the United States, Volume II - 1933-1953 (1968) ("The Golden Web") at 174-81, documenting how southern racists, particularly Congressmen Eugene Cox of Georgia and Martin Dies of Texas, tormented FCC Chairman James Lawrence Fly and his staff for years. Cox, "being from a state with a poll tax and race barriers, had repeatedly been sent to Congress by a handful of the adults in his district - in 1938, by 3.8 per cent." Cox and Dies, in coalition with conservative northern Republicans, "dominated the politics of the period, and, not unnaturally, had [their] impact on the broadcasting field." Id. at 174.

148/ See pp. 90-92 infra.

149/ See pp. 76-78 supra.

broadcasters. Indeed, no broadcast program at an HBCU was established until 1971, when Howard University and Hampton University established their programs in reliance on the promise of employment opportunities stemming from the just-adopted EEO Rule.

One might think that the Commission's character qualifications test would have required denying segregationists' broadcast applications. Incredibly, the reverse was true. In a published decision that is the smoking gun of this story, the Commission resolved a conflict between the Communications Act and a state segregation law by giving full faith and credit to the state segregation law. Remarkably, this decision was issued in 1955, a year _after_ _Brown I_.

This startling decision, _Southland Television Co._,[150] arose in a VHF comparative licensing case. The Commission had to decide which of three applicants would be granted a free construction permit for millions of dollars worth of spectrum space with which to construct what would become the ABC affiliate in Shreveport.

One of the applicants, Southland Television, was headed by Don George, a movie theater operator. Louisiana law governing movie theaters assumed that theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.[151]

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150/ 10 RR 699, _recon. denied_, 20 FCC 159 (1955) ("_Southland_").

151/ The law was thought at the time to be "race-neutral" because the theater owners, rather than the state, decided which race was consigned to which story of the theaters. But every African American person over 40 remembers which story was the "Black" story.

Mr. George, who did not want African Americans to patronize his theaters at all, was hampered by the literal language of the Louisiana movie theater segregation law, which contemplated two-story theaters. To avoid this law, he built Louisiana's first one-story theaters, and also operated Louisiana's only Whites-only drive-in theaters.152/

A competitor for the license, Shreveport Television, was the nation's first TV applicant known to include African American stockholders. Shreveport Television noted that Mr. George contemplated construction of a studio for live broadcasts. Shreveport Television asked the Commission to disqualify Mr. George's company because, based on Mr. George's history of movie theater operations, he could be expected to deny African Americans the opportunity to sit in the studio audiences for live productions153/ at the television station.154/

The Commission was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters, nor any evidence that "such admission would be legal under the laws of that state."155/ In doing so, the Commission

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152/ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage miscegenation.

153/ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters. Southland Television proposed to have a balcony in its studio.

154/ Harry Plotkin, of Arent Fox Kintner Plotkin & Kahn, deserves our thanks for coming up with this way-ahead-of-its-time argument. Harry Plotkin passed away three years ago, and God bless him.

155/ Id., 10 RR at 750.

regarded state segregation laws as harmonious with the Communications Act, having gone so far as to ratify a broadcast applicant's efforts to evade a state law that required theaters to admit theaters African Americans even on a segregated basis.156/

Before and during the 1950s, the Commission continued to ignore even the most open and notorious discrimination. In 1956, almost every southern NBC affiliate refused to carry "The Nat King Cole Show" -- forcing NBC to cancel the critically acclaimed program (which is now seen in reruns on The Jazz Channel.) Faced with this open and especially repugnant expression of race discrimination by dozens of its licensees, the Commission did nothing.157/

In the 1960s, the civil rights movement hardly left the Commission untouched. As the Commission was aware, it was not

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156/ Citing Southland, seven years ago the Commission tentatively acknowledged for the first time that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and...special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." Section 257 Inquiry, supra, 11 FCC Rcd at 6306 (citing Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, En Banc Advanced Television Hearing, MM Docket No. 87-268 (December 12, 1995) (on file with counsel of record) at 2-3 and n. 2).

157/ Actually, the FCC failed from its inception through the 1970s to lift a finger to investigate or sanction intentional discriminators. The FCC could hardly have been unaware of how ironclad was the exclusion of minorities from broadcasting in the 1930s, 1940s and 1950s, nor could it not have known of the active role played by its leading licensees, CBS and NBC. William Barlow explains:

(n. 157 continued on p. 83)

until 1962 that a television network employed an African American reporter (Mal Goode, as ABC's United Nations correspondent). But the Commission's response to the cry for freedom reflected timidity

157/ (continued from p. 82)

> As they rose to the pinnacle of power in the radio industry, both NBC and CBS followed what amounted to a Jim Crow policy with respect to the employment and portrayal of African Americans. Neither network hired blacks as announcers, broadcast journalists, or technicians, and certainly no blacks became producers or executives in the national operations. None of the network affiliates was black owned, nor were any of the independent stations. During the 1930s, the few African Americans working in radio were the musicians, comics, and entertainers sporadically heard on the network airwaves....
>
> The few African American actors and actresses hired by NBC and CBS were invariably cast in similarly stereotypical comedy roles, thus reinforcing the airwaves blackface legacy....The public affairs shows on network radio routinely avoided racial issues and rarely included black participants in their public forums.
>
> These Jim Crow policies reflected the nation's troubled race relations and the particular needs of network broadcasting. Network policy makers understood that they could not gain mass appeal by upending social conventions or taking controversial stances, especially on race matters. Both networks adopted employment practices in line with the exclusionary membership policies of the three key labor unions involved in the entertainment side of the industry: the American Federation of Musicians (AFM), the American Federation of Radio Actors (AFRA), and the Radio Writers Guild (RWG)....The AFM was divided into segregated local unions, and almost all the musicians' jobs on network radio were controlled by the white locals. The other two unions admitted no black members until the years of the second world war, and then only a token few. Thus, the unions in tandem with the networks systematically excluded African Americans from employment opportunities in the radio industry....
>
> The commercial sponsors of network programming hewed to a similar line. In general, sponsors were extremely reluctant to bankroll programs with African Americans in leading roles, fearing that their products would become black identified and unappealing to white consumers....

(n. 157 continued on p. 84)

and hostility, in stark contrast to the forthright efforts of other agencies of the Kennedy and Johnson administrations.

An early test of the Commission's stance on civil rights came in Broward County Broadcasting, a 1963 case involving an AM station, WIXX, that the Commission had just licensed.158/ The station was licensed to and situated in Oakland Park, a suburb adjacent to Ft. Lauderdale. The substantial Black population of Ft. Lauderdale received no Black-oriented programming from any station. Consequently, WIXX decided to devote some of its program schedule to Black-oriented news, public affairs and music.159/

The City of Oakland Park complained to the Commission that WIXX was offering a format which the city did not need or want

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157/ (continued from p. 83)

> Finally, the emergence of Jim Crow on network radio owed something to explicit racial policies in the South. The networks' Southern affiliates, in line with the region's segregationist social order, refused to allow African Americans access to the airwaves and threatened to boycott any network programs that violated their color line. For the networks and their sponsors, who now depended on a national audience, the threat was a significant deterrent.

Voice Over, supra, at 27-28. See also The Golden Web, supra, at 91 (documenting how even the outstanding public affairs programs of 1930s and 1940s completely excluded African Americans).

A discussion of the FCC's continued unresponsiveness to private discrimination in the period 1960-1980 is found in Market Entry Barriers, supra, at 91-101.

158/ Broward County Broadcasting, 1 RR2d 294 (1963).

159/ Id. at 296. The station's decision was entirely reasonable, coming right on the heels of the Commission's pronouncement that one of the fourteen elements of public service the Commission expected of broadcasters was service to minority groups. Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 RR 1901, 1913 (1960) ("1960 Programming Statement").

because "the Negro population to be catered to all reside beyond the corporate limits of Oakland Park."160/ The city government was fearful that African American professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

The Commission had no business regulating program content, and even less business facilitating housing segregation.161/ Nonetheless, it threw the station into a revocation hearing for changing its programming plans from the "general audience" schedule

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160/ Id. at 294.

161/ Eighteen years later, the Supreme Court held that the Commission may not regulate program formats. FCC v. WNCN Listeners Guild, supra, 450 U.S. at 582. But even by 1963, the Commission had long since stopped engaging in case-specific format regulation. The first and last time the Commission openly regulated formats was in a repulsive line of cases in the late 1930's. The Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in "foreign languages" -- code for Yiddish, the language commonly used by Jewish refugees who had escaped from Germany, Poland and Russia. In Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), the Commission held that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) and Voice of Brooklyn, 8 FCC 230, 248 (1940). Commission decisions like these must have been comforting to some of the notorious anti-Semites (and some Axis supporters) who played a leading role in radio broadcasting at the time. See The Golden Web at 221-22, describing the "enormous" influence of the "Richards Stations", WJR Detroit, WGAR Cleveland and KMPC Hollywood in the 1930s and 1940s, whose owner, George Richards, put Father Coughlin on the air. Richards was an obsessive anti-Semite who insisted repeatedly that his news departments slant the news to attack Jews.)

Plainly, a minority entrepreneur seeking a license from a federal agency capable of issuing decisions like these would have been insane.

originally proposed in its licensing application. That was a "character" violation -- and the height of hypocrisy in light of the Commission's finding eight years earlier in Southland Television that segregationists were of fine character in the eyes of the Communications Act.

Faced with the probable loss of its license, WIXX dropped most of its Black-oriented programming. The Commission then quietly dropped the charges, proving that its real interest was the suppression of Black-oriented programming and not the licensee's "character" at all, which could hardly have been cured by "compliance" after a hearing was designated.

Two years later, in The Columbus Broadcasting Company, Inc.,[162/] the Commission was faced with a radio licensee who had used his station "to incite to riot...or to prevent by unlawful means, the implementation of a court order" requiring the University of Mississippi to enroll James Meredith. After President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the radio station called upon its listeners to go to Oxford and assemble to prevent Mr. Meredith's enrollment. Hundreds answered the call, and two people (one of whom was a French journalist) were killed in the ensuing riot.

Nonetheless, the Commission merely "admonished" the station, ignoring the obvious fact that broadcast licenses are not conferred so they can be used in the incitement of riots. The Commission's

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162/ 40 FCC 641 (1965).

inaction was especially startling given the unlikely source of the complaint: the Federal Bureau of Investigation.163/

The federal courts soon lost patience with the Commission's discriminatory policies. In UCC I, the D.C. Circuit ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which broadcast only the White Citizens Council's viewpoint on civil rights. WLBT-TV went so far as to censor the Evening News with Douglas Edwards, displaying a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed.164/

After an overwhelmingly one-sided hearing, the Commission renewed WLBT-TV's license *again*. On appeal again, the Court ordered the Commission to deny WLBT's license renewal. The Court had never before taken such an extraordinary action, but this time it held the administrative record to be "beyond repair."165/

The Commission's new antidiscrimination policy -- forced on it by the court in UCC II -- was applied inconsistently at best. In a

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163/ FBI Director J. Edgar Hoover was hardly known for initiating prosecutions on his own motion related to civil rights-related murders. Hoover must have brought the FCC a *very* solid case.

164/ UCC I, *supra*, 359 F.2d at 998. *See* Dedication at pp. v-vi *supra*, discussing Dick Moore's role in bringing this landmark case.

165/ UCC II, *supra*, 425 F.2d at 550. *See* Bush and Martin, *supra*, 48 Federal Comm. Law Journal at 439-440 n. 94 (noting that evidence in the record showed that the Commission was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology.") The authors cite UCC II as an example of FCC conduct which might fall short of *de jure* discrimination, but which had the same effect.

1971 Birmingham, Alabama UHF television comparative case,166/ the Commission had before it several applicants seeking construction permits. One applicant, Alabama Television, had a 16.2% stockholder, John Jemison, who owned a Birmingham cemetery. Jemison had participated in the cemetery's 1954 decision to continue its original 1906 policy of excluding African Americans.

The policy came to light when the cemetery turned away the body of an African American soldier, a war hero killed in Vietnam. Yet the Commission found "extenuating circumstances" in Alabama Television's claim that the cemetery would have been sued by White cemetery plot owners if the solder's body lay there.167/ Thus, the Commission ordered a hearing -- but framed the issues to focus only on why the applicant had covered the matter up, not whether a rabid segregationist had the moral character to be a federal licensee.168/ Even these allegations of a cover-up were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges."169/

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166/ Chapman Radio and Television Co., 24 FCC2d 282 (1971) ("Chapman").

167/ Id. at 284. This was ridiculous. Twenty-two years earlier, the Supreme Court had ruled that such restrictive covenants were unenforceable. Hurd v. Hodge, 334 U.S. 24 (1948). Needless to say, the FCC had no business ratifying segregation of the dead.

168/ Chapman, supra, 24 FCC2d at 284. This HDO shows that Southland was still good law even as late as 1971. Southland can probably be considered a dead letter only after the D.C. Circuit's TV 9 decision in 1973, which compelled the Commission to consider minority ownership as a factor in broadcast licensing.

169/ Chapman Radio and Television Co., 21 RR2d 887, 895 (Kraushaar, Examiner, 1971).

A footnote to the era of comparative hearings: as the spectrum became almost fully occupied, the Commission lost its ability to give away spectrum to minorities as a remedy for its own facilitation of discrimination in its giveaway of the spectrum. Consequently, and to its credit but without a hint of irony, the Commission began to focus on how to incentivize nonminority broadcasters to sell to minorities what they'd been given for free.[170/] But in doing so, the Commission failed to seriously examine a modest 1978 proposal by Commissioner Hooks to apply a measure of transparency to the "old boy" process by which minorities were almost entirely shut out of the broadcast station transactional market.[171/] More recently, the Commission has done nothing -- not even made a recommendation to Congress pursuant to Section 257 -- to address the endemic and market-distorting discrimination against minority broadcasters by advertisers that the Commission's own contracted research has uncovered.[172/] In

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170/ See 1978 Minority Ownership Policy Statement, supra.

171/ Public Notice of Intent to Sell Broadcast Station, supra (rejecting proposal that would have required sellers to market their stations publicly for 45 days in order to afford minorities notice and an opportunity to bid.) Not until MMTC entered the business in 1997 were any minorities engaged in station brokerage, as entrepreneurs or even as professional employees of brokerages.

172/ See Kofi Ofori, "When Being Number One Is Not Enough: The Impact of Advertising Practices On Minority-Owned And Minority-Formatted Broadcast Stations," Civil Rights Forum on Communications Policy (1999). This study examined discriminatory advertising practices and their impact on minority owned and minority formatted broadcasters. Its central finding was that radio stations that are successful in attracting large minority audiences still do not attract the dollars their ratings should earn. Anecdotal data collected by the study suggested that in some instances the media buying process is influenced by stereotypical

(n. 172 continued on p. 90)

these disturbing omissions, the ghost of Southland still dwells in the FCC's attic. The Commission no longer encourages race discrimination, but it still tolerates race discrimination.

### c. The Commission Administered A Broadcast Licensing System That Replicated The Effects Of Past Discrimination And Rewarded Beneficiaries Of Discrimination

Southland was one of the first of the great television comparative hearings, and Chapman was among the last. Today, virtually all of the television and radio spectrum in the United States has been given away.173/ The Commission awarded minority owned companies exactly two out of about 1,200 free television licenses. In effect, the Commission presided over a 99.8% set-aside for Whites in television. To the best of MMTC's knowledge, only about 100 minority controlled applicants ever won construction permits for new facilities, so there has been about a

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172/ (continued from p. 89)

perceptions of minorities, presumptions about minority disposal income, a desire to control product image and unfounded fears of pilferage. The study identified two particularly egregious practices: "no urban/Hispanic dictates" (an advertiser's instructions to its agency to refuse to buy airtime on stations with Black or Spanish formats) and "minority discounts" (an advertiser's refusal to pay as much to reach minority audiences as it would pay to reach White audiences, other factors being equal).

A followup regression analysis (not part of the Commission's Section 257 process) found that advertisers paid less for time on stations owned by minorities (especially standalone stations), stations having minority formats, and stations targeted to young audiences. Kofi Ofori, "Minority Targeted Programming: An Examination Of Its Effect On Radio Station Advertising Performance" (January, 2001). These factors appeared to be a proxy for "no urban/Hispanic dictates" and "minority discounts."

173/ See NPRM at 19882 ¶46.

99.2% set aside for Whites in radio.174/ At least the Commission has finally recognized that its own misconduct might have been responsible for that outrage.175/

For decades, there were few minority entrepreneurs who could bear the sheer cost of a comparative hearing. The few who could do so found that the rules were written to exclude them. One qualifying factor and two comparative factors in proceedings for construction permits specifically discouraged minority entry.

The financial showing required just to qualify for comparative evaluation of an application was irrationally high. Under the Ultravision rule, applicants had to have reasonable assurance of sufficient financing to underwrite construction and a full year of broadcast operation with zero revenue.176/ The Ultravision standard asssumed that a broadcaster would not collect for the sale of a single spot for a year after signing onto the air -- an absurd assumption for an expert agency to make. When the Commission repealed Ultravision in 1981, it found, with dry understatement, that Ultravision "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."177/

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174/ See Market Entry Barriers, supra, pp. 102-106 (extensive anecdotal evidence of the gross inadequacy of the comparative hearing process in producing minority broadcast licensees.)

175/ When the Commission first sought comment on the scope and implementation of Section 257, it acknowledged for the first time that its own policies of licensing and renewing the licenses of segregationists might have contributed to minority exclusion from the industries it regulated. See p. 82 n. 156 supra.

176/ Ultravision, supra, 1 FCC2d at 547.

177/ Financial Qualifications Standards, supra, 87 FCC2d at 201.

Minorities were specifically disadvantaged by the Ultravision rule. Thanks to the aftereffects of slavery and serfdom, minorities did not possess large sums of inherited wealth, which was usually the financial source of choice for so speculative a venture as a new broadcast station. Lacking inherited wealth, minorities were generally compelled to secure "reasonable assurance" letters from financial institutions. But thanks to the broadcast industry's segregation -- facilitated by the Commission itself -- most minorities lacked broadcast experience, making it difficult to persuade financial institutions to provide support for construction permit applications.

Minorities' lack of broadcast experience, as well as their lack of a broadcast record (operating experience) also inhibited minority applicants even if they were found to be financially qualified. Even as late as 1993, past broadcast experience was enough to swing the grant from a minority to a nonminority in a comparative case.178/

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178/ See, Great Lakes Broadcasting, 8 FCC Rcd 4007, 4010 (1993) (Dissenting Statement of Commissioner Andrew Barrett). The use of broadcast experience as a licensing criterion dates almost to the Commission's inception. See William S. Thellman, 2 FCC 548 (1936) (denying application for new station because, inter alia, the applicant and his proposed program director had no broadcast experience). The use of past broadcast record as a licensing criterion dates back more than two generations. See WJR, The Good Will Station, Inc., 9 RR 227 (1954) (awarding a comparative preference to an applicant that had operated a station in the community). The use of these criteria was famously (or infamously) memorialized in the Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393, 396, 398 (1965).

### d. The Commission Failed Repeatedly To Correct Minorities' Poor Access To Quality Technical Facilities

Not only have minorities secured few facilities, those they did secure were usually technically inferior. For years minorities have resided on the inferior side of what we call the "Analog Divide," which preceded the digital divide by two generations. Born of Commission policies that denied minority owned companies a chance to break into radio until well after the most valuable facilities were already licensed to Whites, the Analog Divide relegated minorities disproportionately to high-band low power AMs and low-tower low power FMs.179/ Even today, as our research demonstrates, minorities continue to be burdened by inferior technical facilities -- a vestige of the days when Commission policies prevented minorities from participating in media ownership while others were allowed to feast on the finest frequency allotments available.180/ Nonetheless, the Commission has repeatedly refused to do anything that might improve minority access to higher quality technical facilities.

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179/ As explained in Market Entry Barriers, *supra*, at 116:

> [w]hether it was late market entry...insufficient funds for the purchase of larger market licenses, or the perception of brokers and sellers that small businesses, especially minority businesses, couldn't afford the more powerful signal stations, small, minority- and women-owned businesses frequently ended up with inferior properties....we found this with minority-owned businesses more than any other demographic group.

180/ *See* Consolidation and Minority Ownership, *supra*, at 15-18 (finding that while there is no longer a racial disparity in AM stations' power levels, minority owned AM stations still tend to occupy the less desirable higher frequency end of the band. Furthermore, minority owned broadcasters are more likely than nonminority owned broadcasters to own Class A FM stations.)

The Commission repeatedly refused to bridge the Analog Divide through its spectrum management or structural regulatory authority. Whenever it refused to act, it invariably pointed to the tax certificate, distress sale and comparative hearing policies as alternate means to promote minority ownership.181/ But with these policies repealed or eviscerated, the only tools left to promote minority ownership are spectrum management, the structural

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181/ See, e.g., Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Memorandum Opinion and Order on Reconsideration), 4 FCC Rcd 5102, 5104 ¶19 (1989) (minorities "would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station"); Clear Channels Repeal, 102 FCC2d at 558 (a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership.)

This refrain of reliance on the minority ownership policies also characterized various Commission regulatory misadventures outside the spectrum management field. In Deregulation of Radio (NPRM), 73 FCC2d 457, 482 (1979), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id., 84 FCC2d at 977. See also Top 50 Policy Repeal, supra, 75 FCC2d at 599 (Separate Statement of Chairman Charles Ferris); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second Report and Order), 101 FCC2d 638, 645 ("Implementation of Docket 80-90"), recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Clear Channels Repeal, supra, 102 FCC2d at 558; cf. 1992 Radio Rules, supra, 7 FCC Rcd at 2769-70 ¶¶26-29 (relying on minority ownership policies to further diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)