

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

| | | |
|---|---|----------------------|
| In the Matter of: |) | |
| 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 |) | MB Docket No. 02-277 |
| Cross-Ownership of Broadcast Stations and Newspapers |) | MM Docket No. 01-235 |
| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets |) | MM Docket No. 01-317 |
| Definition of Radio Markets |) | MM Docket No. 00-244 |
| Definition of Radio Markets for Areas Not Located In An Arbitron Survey Area |) | MB Docket No. 03-130 |

TO THE COMMISSION

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

The Diversity and Competition Supporters respectfully reply to the October 6, 2003 "Opposition of the National Association of Broadcasters to Petition for Reconsideration" ("NAB Opp.")^{1/}

Our petition for reconsideration objected to the Commission's decision to repeal the Failing Station Solicitation Rule ("FSSR").^{2/} Therein we noted that the FSSR was the only policy specifically aimed at ensuring that minorities have an opportunity to purchase television stations. Petition for Recon. at 32. Further, the Commission failed to note why the policy was created, acted without evidence, and acted on the illogical basis that since it would be "unusual"

^{1/} The views expressed in this Reply are the institutional views of the Diversity and Competition Supporters, and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

^{2/} Our Petition for Reconsideration used the term "Sales Solicitation Feature" of the "Failed/Failing/Unbuilt Station Policy," which was a misnomer. It mandates conduct by regulatees, and therefore it is a rule, not a policy. See Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12936-37 ¶74 (1999), recon. granted in part, 14 FCC Rcd 20571 (1999), further recon. granted in part, 16 FCC Rcd 1067 (2001), reversed and remanded in part sub nom. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), rehearing denied, 2002 U.S. App. LEXIS 16618 (D.C. Cir., August 12, 2002), rehearing en banc denied, 2002 U.S. App. LEXIS 16619 (D.C. Cir., August 12, 2002). The term "Failing Station Solicitation Rule" or "FSSR", used herein and in our brief in Prometheus Radio Project, Inc. v. FCC, No. 03-3388 (3d Cir., filed October 21, 2003) more accurately describes the rule. The rule applies to failed, failing and unbuilt stations.

for a station to be bought by an out-of-market company, the Commission should no longer require sellers to give out-of-market companies a chance to buy their stations.^{3/}

In opposition, the NAB reasserts that financially troubled stations might find it “futile” to find an out of market buyer, so that it would be too burdensome to require the seller “to hunt for an out-of-market buyer, if an in-market entity was ready and willing to purchase the permit and construct the station.” NAB Opp. at 12. The NAB adds that a station in Hartford, CT was not constructed for 41 years, at which time the permittee was able to construct by entering into an LMA with an in-market competitor. *Id.*, n. 19.

The NAB’s point is not well taken. In-market operations are not the only source of synergies that attract financing. Regional operators, or minority-targeted companies aiming at niche audiences (e.g. owners of Univision or Telemundo affiliates, or minority owned companies trying to build platforms on UPN or WB affiliates) might very well be able to submit competitive bids. It does not take long to find out. The task of determining whether out of market buyers are interested is not time consuming, expensive or burdensome. That process, undertaken by an experienced media broker, hardly imposes significant costs or delays on the transaction process. On the other hand, in some instances it will open the door of opportunity to a new entrant, which is why the Commission adopted the FSSR. The NAB does not show that the FSSR has caused any difficulties, or that it is not “necessary in the public interest” under 47 U.S.C. §161 as the Commission’s only effort to promote minority television ownership.^{4/}

Finally, the NAB states that “[t]here is no reason to assume that an out-of-market buyer will necessarily be a new entrant to the broadcast industry (or a minority or female-controlled

^{3/} 2002 Biennial Regulatory Review -- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277 (Report and Order and Notice of Proposed Rulemaking), 18 FCC Rcd 13620, 13708 ¶225 (2003) (“Report and Order”) (citing NAB Comments at 80 n. 148).

^{4/} The NAB’s Hartford example shows why the Commission should not extrapolate from a sample size of one. Between 1954 and 1995, hundreds of stations in markets of all sizes have started up and operated successfully without having to seek the shelter of an alliance with a competitor, at the cost of a scarce local television voice. We do not know the circumstances of this particular example, but certainly that station did not run into 41 years of difficulty being built out because its owner was wasting time trying to sell to out-of-market companies.

entity.)” NAB Opp. at 13. True enough, but that is because the FSSR is a race and gender-neutral policy which offers an opportunity to minorities and women without excluding others who might also offer an additional voice in a local market.^{5/} Indeed, the FSSR would have value even if there were no minority or female broadcasters in America, since it would protect the interests of local viewers in preserving, if at all possible, the maximum number of local television voices. Duopolies should be a last resort when all other means of saving a station have failed.

While minority broadcasters often lack access to capital, they also far too often lack access to opportunity, and are not notified when stations are available to be purchased. It is a vicious cycle: access to capital comes with dealmaking opportunities; and the FSSR has helped create a climate in which minorities are more likely to learn of these opportunities. The FSSR was a good first step toward wider transactional transparency that would reduce the influence of the old-boy network and increase reliance on merit as a criterion for business success.

Congress has instructed the Commission to undertake to make the radiofrequency spectrum 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,” 47 U.S.C. §151, and to undertake to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership or telecommunications services and information services,” 47 U.S.C. §257(a). Repealing the only rule that served these purposes in the television industry was hardly responsive to Congress’ commands.

The Commission has stated that it sees “merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities.” Report and Order, 18 FCC Rcd at 13637 ¶52 (discussing proposal to ban on transactional discrimination). In that spirit, the Commission should seize the opportunity on reconsideration to restore the FSSR.

^{5/} Compare MD/DC/DE Broadcasters Ass’n. v. FCC, 236 F.3d 13, 19 (D.C. Cir.), rehearing denied, 253 F.3d 732 (D.C. Cir. 2001), cert denied, 534 U.S. 1113 (2002), which held that one option of the FCC’s then-operative EEO program (“Option A”), under which “licensees remain free...to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience” does not unconstitutionally pressure broadcasters to recruit women and minorities.

Respectfully submitted,

David Honig

David Honig
Fatima Fofana
Minority Media and
Telecommunications Council
3636 16th Street N.W., Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for Diversity and
Competition Supporters

October 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2003, I caused a copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to be served by e-mail and by U.S. First Class Mail, Postage Prepaid, to:

Henry L. Baumann, Esq.
National Association of Broadcasters
1771 N Street N.W.
Washington, DC 20036

/s/

David Honig