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Final Report

History of the Broadcast License Application Process

Prepared for the FCC as a deliverable for the study of "Estimation of Utilization Rates/Probabilities of Obtaining Broadcast Licenses from the FCC"

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For
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I. Introduction

This paper presents a history of the process by which applicants for broadcast licenses have been awarded licenses directly by the Federal Communications Commission ("FCC"). The paper has been prepared as a deliverable for the Study of Estimation of Utilization Rates/Probabilities of Obtaining Broadcast Licenses from the FCC (the "Comparative Hearing Study"). The Study will assist the FCC in implementing Section 257 of the Telecommunications Act of 1996 ("1996 Act")[1] and Section 309(j) of the Communications Act of 1934 ("1934 Act").[2] Section 257 of the 1996 Act mandates that the FCC identify and eliminate market entry barriers for small telecommunications businesses. Further, Section 309(j) of the 1934 Act requires the FCC to further opportunities in the allocation of spectrum based services for small businesses and businesses owned by women and minorities. The Comparative Hearing Study will help the FCC in examining whether there is evidence of past discrimination in the process by which broadcast licenses have been awarded by the FCC.

One area of analysis for the study will focus on the FCC policies stated in this paper and determine how these policies may have impacted the outcomes of the licensing process. This paper is important in that it provides a backdrop for understanding how FCC policies may have affected small and women- and minority-owned businesses.

The paper is organized as follows. Section II describes the 1934 Act and early comparative hearings. Section III discusses the Policy Statement on Broadcast Comparative Hearings, 1 F.C.C.2d 393 (1965) (hereinafter 1965 Policy Statement). The 1965 Policy Statement was the first major official FCC statement that outlined many of the criteria that would be applied by the FCC during the consideration of multiple applications for a single broadcast license. Section IV addresses the factors that brought the elimination of comparative hearings. Section V discusses broadcast services. Section VI describes the evolution of the FCC's ownership rules. These rules have changed substantially since the early 1940s in order to reflect the views of Congress and the Judiciary about how much concentration should be tolerated in local and national broadcast markets. Section VII describes the chronology of FCC minority and gender based ownership and employment policies. These policies were developed by the FCC in order to carry out that part of its mission as determined by Section 257[3] of the Telecommunications Act of 1996 and section 309(j)[4] of the 1934 Act. This Section also provides a brief summary of recent developments as they relate to gender and race-based policies. Section VIII provides a summary to this paper.

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1 47 U.S.C. §257 (1996).

2 47 U.S.C. §309(j) (1934).

3 47 USCS § 257 states that the "Commission shall complete a proceeding for the 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, or in the provision of parts or services to providers of telecommunications services and information services."

4 47 USCS § 309(j)(3)(B) states that the FCC has the responsibility of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

II. Communications Act of 1934 and Early Comparative Hearings

The FCC was created by the Communications Act of 1934 (the "Act").[5] The Act granted the FCC the authority to regulate "communications by wire and radio so as to make available to all the people of the United States a rapid, efficient, nation-wide, and worldwide wire and radio communication service." This Act also empowers the FCC to issue broadcasting licenses "as public convenience, interest, and necessity requires."[6]

One landmark court case that was resolved in 1945 reinforced the importance of the comparative hearing process in awarding a broadcast license when there are multiple applicants. In *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Supreme Court of the United States held that:

> Where the Federal Communications Commission has before it two applications for broadcasting permits which are mutually exclusive, it may not, in view of the provisions of the Act for a hearing where an application is not granted upon examination, exercise its statutory authority to grant an application upon examination without a hearing.

This decision set the legal precedent that a publicly distributed license must be assigned through a process that does not exclude competition for the license. The process of comparative hearings, therefore, was upheld.

A comparative hearing was necessary when more than one applicant applied for the same broadcast license. In the event of multiple applicants, the FCC would hold a comparative hearing, a proceeding that was presided over by an Administrative Law Judge (ALJ). The purpose of the comparative hearing was to determine which applicant for a broadcast license is best qualified to hold the license.

The rest of this section briefly describes the process to acquire a new station license as it is related to the comparative hearing process and the concept of "best qualified" applicant.

The FCC took several miscellaneous factors into consideration in the pre-1965 comparative hearings. The factors that the Commission has favored are "(1) local residency of the owners, who are expected to be thoroughly conversant with local needs, (2) integration of ownership and management, whereby the owners will take an active part in the day-to-day operation of the station,

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5 Communications Act of 1934, ch. 652, 48 Stat. 1064, 73rd Cong., 2d Sess. (1934) codified as amended at 47 U.S.C. §151 et seq. (1937).

6 Lawmakers anticipated the possibility that disputes might arise in the process of awarding broadcast licenses. *Section 309 (a)* of the Act grants authority to the FCC to assign any dispute over a license to a judicial hearing:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof *in accordance with said finding. In the event* the Commission upon examination of any such application does not reach such a decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for the hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(3) active participation by applicants in civic affairs, (4) broad diversification of background and interests, and (5) past broadcast experience."[7]

While diversification of control was never an officially stated objective prior to 1965, the FCC mentioned it in the Federal Register in 1944[8]. Early on, the FCC was sensitive to the danger and abuse that could result from one organization owning a concentration of media interests and so the FCC disfavored applicants who would gain a "monopoly" in a particular region. Media interests were not limited to broadcast media, rather, they could include newspaper or other media outlets. Although not common, there were cases that were decided on the basis of diversification.[9] As will be discussed later in this paper, in 1965[10] the FCC made *diversification* a "factor of primary significance" in the comparative hearing process.

In sum, in the early years of the comparative hearing process, the FCC began to interpret the standard of "public interest, convenience or necessity" in the distribution of broadcast licenses. These early interpretations developed as trends in the licensing process and were eventually upheld by decisions, and, as will be discussed later, were finally codified in 1965.

III. 1965 Policy Statement on Comparative Broadcast Hearings

Until 1965, comparative hearings proceeded on the premise that the winning applicant should prove to best serve the public interest, convenience, or necessity out of all of the applicants. These criteria were too broad however and left many issues undecided. Realizing this, the Commission issued the 1965 Policy Statement. This statement defined the "two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a *maximum diffusion* of control of the media of mass communications." While trying to avoid attaching absolute values to each criterion, the Commission provided guidance on seven areas on which a comparative hearing could be decided.

1. Diversification of control of the media of mass communications.
2. Full-time participation in station operation by owners.
3. Proposed program service.
4. Past broadcast record.
5. Efficient use of frequency.
6. Character.
7. Other factors.

Each of these seven factors will be discussed below.

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7 64 Harv. L. Rev. 947

8 9 FED. REG. 702

9 4 F.C.C.2d 227, 8 RR 2d 330 (1966) (3 R.R. 1961 (1948)

10 1 F.C.C.2d 393 (1965).

1. The FCC treated diversification of control of the media of mass communication as a factor of primary importance in the comparative hearing process. If an applicant had controlling interests in other media of mass communications then there was the potential for this factor to reduce the probability that this applicant would be awarded a license.

   How much the probability of success was reduced by this factor depended upon:

   a) the size of the applicant's other media holdings;
   b) the proximity of these holdings to the community associated with the contested license;
   c) the degree to which these other holdings were regional or national; and
   d) the quantity and quality of competing media outlets in the localities associated with the applicant's current holdings.

   This factor was of such significance that the details of the rules and how they have changed over the years are worth describing (see section IV).

2. The FCC treated the degree of full time participation in station operation as of substantial importance in the comparative hearing process. An applicant would receive no credit for this factor unless he/she could demonstrate some form of daily participation in the operation of the station. Credit would be given if the applicant could demonstrate that he/she would be in a position of influence in the daily operation of the station (e.g. general manager, station manager, program director). Credit would also be received if the applicant could show local residency and/or civic participation. Finally, the applicant could receive limited credit if he/she proposed to move to the locality associated with the station or if the applicant could demonstrate some experience with the community even if they were not to be involved in the day-to-day operations of the station.

3. Proposed program service was an additional factor considered by the FCC in the comparative hearing process after 1965. Applicants had to demonstrate that their program proposals were designed to meet a public need. Superior devotion to public service and local matters was looked upon favorably. This factor was only relevant when there were significant differences between the program services of competing applicants.

4. The FCC considered previous broadcast experience as substantially important. This factor had the potential to add to or subtract from an applications probability of success. Unusual attentiveness to public needs and interests would improve the chance of a successful application while obvious inattention to public needs and interests would reduce the chances of success. This factor was usually only relevant for applicants with unusually good or unusually poor past performance records.

5. Efficient use of frequency was a factor established to capture variation in the technical characteristics of each application. Namely, the Commission was interested in the number of people who lived within the proposed station's service area. This factor was typically evaluated

on a case by case basis. It was especially relevant for services in which technical processes are less regimented (e.g. AM radio).

The 1965 Policy Statement introduced applicant character as a relevant consideration in the comparative hearing process. Character deficiencies associated with an applicant may be cited as grounds for disqualification.

The FCC has scrutinized existing and potential licensees on the basis of "character." Up until 1985, the term "character" was often interpreted as *moral* character and character inquiries often followed the same interpretation. In 1981, the Commission issued a notice of inquiry which discussed the standardization of policies regarding character issues which was later described as an effort to "eliminat[e] . . . the morally-tinged decision-making of the past." On January 14, 1986, the FCC issued a policy statement on character[11] that outlined which character issues should be considered and how those issues should be investigated. Those actions to be considered include the following:

a) Fraudulent misconduct before a government agency;
b) Criminal convictions; Antitrust and anticompetitive commercial practices;
c) Violations of the Communications Act. Commission FCC rules and policies;
d) Misrepresentation or lack of candor to the commission & abuse of process;
e) Deceptive or fraudulent programming;
f) Misconduct by corporate applicants;
g) Employee misconduct; and
h) Misconduct in parent-subsidiary relationships and related subsidiary.

While the range and scope of the character policy remained relatively large, in practice, character issues generally amounted to one opponent showing another opponent's lack of candor to the Commission regarding finances, business dealings, or proposed station arrangements. Eventually, character issues were eliminated as a comparative criterion but were kept as a basic requirement.

6. The FCC also allowed for an "other" category. This category allowed applicants, via a petition or motion to enlarge issues, and to submit other evidence they felt should be significant in the decision making process. The applicant submitting this additional information was required to demonstrate the relevance of the information. The practice of enlarging issues became widespread enough where, at one time, the Commission designated a separate board to hear and rule on these petitions. Ultimately, though, this responsibility was returned to the Administrative Law Judges.

Financial Requirements

11 *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) ("Character Qualifications"), modified, 5 FCC Rcd 3252 (1990) ("Character Qualifications Modification"), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564, 6566 (1992) ("Further Character Qualification Modification").

While the 1965 Policy Statement did not explicitly address the financial requirements of applicants, this was a central issue in a 1965 Memorandum of Opinion and Order issued by the FCC. The Commission assigned a panel of three commissioners to review the financial issues involved in three cases related to applications for UHF television stations in Buffalo, Cleveland, and Boston. In each community, three commercial VHF stations were in operation, and the question arose as to whether a higher standard should be applied in determining the financial qualifications. The panel concluded that each applicant should be required to project estimated annual revenues over a three-year period and to establish, by evidentiary proof, the basis for such estimates. A majority of the panel further concluded that a realistic estimate of construction costs and operating expenses were also essential and required that each applicant disclose all factors which were considered in computing such costs and expenses. On June 30, 1965, the Commission adopted the following rules governing financial requirement for applicants for proposed stations:

(a) The Commission had to determine the basis of each applicant's (1) estimated construction costs, and (2) estimated operating expenses for the first year of operation.

(b) In the event that the applicant depended upon operating revenues during the first year of operation to meet fixed costs and operating expenses, the Commission had to determine the basis of each such applicant's estimated revenues for the first year of operation.

(c) The Commission had to determine, in light of the evidence, which of the applicants, if any, demonstrated a reasonable likelihood of constructing and continuing the operation of its proposed station in the public interest.

IV. Minority and Female Employment and Ownership Policies

Starting in the 1960s, the FCC has paid close attention to race and gender issues as they relate to broadcasting and the award of broadcast licenses. In this section, we describe the chronology of the FCC's minority and female ownership policies, from their rise in the 1960s and 1970s to their reevaluation in the 1990s. The logic for these programs is best expressed in various court cases and FCC policy statements. Therefore we cite below the most important cases and policy statements affecting the award of credit for minority and female participation in the determination of license awards in the comparative hearing process.

A. Nondiscrimination Employee Practices of Broadcast Licensees

The first time the FCC directly addressed the issue of race in a formal policy ruling was in its 1969 policy forbidding discrimination on the basis of race, color, religion, or national origin in employment practice by licensees of commercial or noncommercial broadcast stations (18 F.C.C.2d 240; 1969 FCC LEXIS 547; 16 Rad. Reg. 2d (P & F) 1561). The Commission asserted its authority in this area by noting that the FCC is charged with ensuring that broadcast stations operate within the public interest and broadcast stations that have discriminatory employment practices do not operate within the public interest. To ensure equal opportunity in every aspect of employment opportunity, each broadcast station was directed to establish a proactive equal employment opportunity program. The FCC reserved the right to act against any broadcast station that violated this policy. This established the Commission's right to, among other actions, revoke licensees and distribute them by distress sales and to hear allegations of EEO violations in comparative hearings. While these actions presented themselves on very rare occasions, and such occasions were restricted to actual findings of discrimination by a court or the EEOC, this policy was seen as a significant gender and race based policy.

However, the U.S. Court of Appeals for the District of Columbia Circuit, in a decision issued in April 1998 (Lutheran Church - Missouri Synod v. FCC), held that certain provisions of the FCC's broadcast equal employment opportunity rules were unconstitutional. That fall, the U.S. Court of Appeals denied the FCC's request for a rehearing of its decision. Thereafter, on November 19, 1998, the Commission adopted a notice of proposed rulemaking (NPRM) outlining new rules to further equal employment opportunity in Broadcasting in a manner that is consistent with the court's decision.

B. Pre-1978 Ownership Policies

1. Mid-Florida Television Corp.

While the FCC monitored for discrimination on the basis of race in the employment practices of broadcast stations, initially the FCC refused to include the racial composition of an applicant group as a relevant factor in a comparative hearing. This position was initially challenged in 1965 by the Comint Corp applicant group in the comparative hearing for a TV broadcast license in Orlando, Florida.

In 1965, the D.C. Court of Appeals vacated the decision that awarded the TV license to Mid Florida Corp. and opened the license to competition. Eight applicants filed for ownership and the matter went to comparative hearing. In the comparative hearing, one of the applicants, Comint Corp., filed an application which included two black owners with a 14% shared interest. The proposed community for the license awarded had a 25% minority population. Comint argued that minority ownership should be given comparative credit on the basis of the 1965 statement on comparative hearings (1 F.C.C.2d 393 (1965)) which stated that the "two primary objectives toward which the process of comparison . . . are . . . the best practicable service to the public, and . . . a maximum diffusion of control of the media of mass communications." The FCC noted that while it:

> "is sympathetic with Comint's argument and recognizes the validity of the goal of increased minority ownership of the media of mass communications .... however, the Communications Act, like the Constitution, is color blind and therefore, in a comparative broadcast proceeding, which is governed by the Commission's Policy Statement . . . Black ownership cannot and should not be an independent comparative factor . . . rather, such ownership must be shown on the record to result in some public interest."

Comint challenged the FCC's refusal to explicitly consider race in the comparative hearing process and appealed the FCC ruling to the DC Court of Appeals.

In the 1974 decision 495 F.2d 929 (D.C. Cir. 1974), the DC Court of Appeals reversed the result of the Mid-Florida comparative hearing. The Court held that comparative merit should be awarded to an applicant, two of whose stockholders, each owning approximately seven percent of the applicant's stock, were Black and would participate in the operation of the station. The Court pointed out that both of the Black principals were local residents of the community being applied for who had been active in advancing the interests of Black members of the community, and that 25 percent of the population of the area applied for were Black. It also noted that since the highest interest owned by any of the applicant's principals was ten percent, the two stockholders' individual and combined ownership was substantial. In addition, no Blacks were then participating in the ownership or management of any of the media of mass communications in that community. In these circumstances, the Court concluded that minority stock ownership is "a consideration relevant to a choice among applicants of broader community representation and practicable service to the public." (161 U.S. App. D.C. at 357, 495 F.2d at 937.) The court went on to comment:

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media entrepreneurship.... We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded. (TV 9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974)).

Accordingly, without recommending or requiring any quota system, the Court held that merit should be awarded for minority ownership where it is likely to increase the diversity of program content, especially of opinion and viewpoint. In a Supplemental Opinion, the Court emphasized that it was not holding that merit should be based on Black ownership alone, but rather in that case upon a meaningful combination of ownership and participation in station affairs which indicated that Black persons having a substantial identification with minority rights would be able to translate their positions and their ownership stake into meaningful effect on this aspect of station programming. The Court also explained that "merit" meant only "favorable consideration," or a plus-factor, not a "preference," and that it was to be weighed along with other relevant factors in determining which applicant is to be awarded a preference. (161 U.S. App. D.C. at 361, 495 F.2d at 941.)

This decision set a new precedent for the incorporation of minority participation as a factor in the comparative hearing process.

2. *Rosemore*

Not long after the Court of Appeals decided that minority credit for integrated minority owners was appropriate, Administrative Law Judges began deciding cases on this basis. Additionally, administrative law judges at the FCC expanded on the *Mid-Florida* decision. In particular, the considerations applied to race in the *Mid-Florida* decision were applied to gender in the *Rosemore* decision.

In *Rosemore Broadcasting, Co., Inc.*, (54 F.C.C. 2d 394, 418 (1975)), the FCC reasoned that integrated female ownership should be awarded credit in comparative hearings because women, like minorities, are "likely to increase diversity of content." The FCC went on to state that female participation in an application can be given credit when it "reflects broader community representation." Because two of the three individuals associated with *Rosemore Broadcasting Co.'s* application were female and these women planned on playing a significant role in the day-to-day operation of the broadcast station, the *Rosemore* application was enhanced in the FCC eyes. The *Rosemore Broadcasting Company* went on to win the license in the comparative hearing.

3. *Atlas Communications*

As in other cases[12], in 1976 the FCC relied on reasoning set forth in *Mid-Florida* when it granted a nighttime broadcast license to a minority owned organization. In this decision, known as the *Atlas Communications* decision (61 F.C.C.2d 995; 1976 FCC LEXIS 1997; 39 Rad. Reg. 2d (P & F) 228), the FCC reasoned:

> ...Black ownership and participation are likely to bring about programming responsive to the needs of the Black citizenry. Therefore, it held that Garrett's identification with Black listeners was a factor to be

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12 Flint Family Radio Inc.

In the 1977 *Flint Family Radio* (61 F.C.C.2d 995; 1976 FCC LEXIS 1997; 39 Rad. Reg. 2d (P &F) 228) decision the FCC appears to heighten the importance of minority ownership and proposed participation in the comparative hearing setting. The Commission applied the rationale of the TV 9 case to this proceeding, and decided that "it is apparent . . . substantial merit for . . . Black ownership and proposed participation must be awarded to an applicant with minority ownership interests." Ultimately, the FCC awarded "moderate preference for integration of ownership and management and a substantial preference for Black ownership and participation" and made "these preferences. . . decisive" in awarding the license to Flint Metro Mass Media, Inc. The commission stated that:

> While we agree that civic participation is a factor to be considered in determining the significance of the merit, the Supplemental Opinion of the Court makes it quite clear that the two essential elements necessary to receive merit are Black ownership and participation by these owners in station affairs. Moreover, as detailed in the Initial Decision (see paragraphs 59-78 of the Initial Decision), Metro's principals sufficiently participated in civic affairs to sustain the award here.

This statement clarified the primacy of importance of both minority ownership and the participation of these owners in station affairs.

taken into account by the Commission in passing on requests for waiver of its technical requirements.

C. *1978 Statement of Policy on Minority Ownership*

Since the DC Court of Appeals in 1974 had set in place minority ownership and employment policies within comparative hearings the FCC and Administrative Law Judges had started awarding minority credit to applicants for broadcast licenses. However, in 1978 the FCC observed a "continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry" and subsequently issued "further Commission action" or Statement of Policy on Minority Ownership of Broadcasting Facilities (See 68 F.C.C.2d 979, 982). This statement formalized the use of minority merits in the comparative hearing process. In this statement, the Commission also officially set in place two programs that favored minority ownership of broadcast stations. First, the tax certificate policy encouraged and promoted minority ownership by giving a two-year like-kind-exchange transfer tax break (USC 1071) for the sale of licenses to minorities if the proceeds were reinvested in a similar communication industry.

The basis of the tax certificate resulted from decisions made more than 30 years earlier. In 1941, the Commission and Congress developed tax certificates as a means to mitigate some of the financial pain inflicted upon RCA due to the involuntary sale of its broadcast property. Tax certificates were used again during the 1970s to ease the pain associated with "voluntary" divestiture of properties associated with the new cross-ownership constraints. The use of tax credits for media outlets, however, was repealed by Congress in 1995 on the basis of perceived abuses but new tax incentive legislation which addresses any previous abuse is currently being proposed by Congress. The second program put into place was the distress sale policy, which allowed for license owners that were under scrutiny by the FCC (and under threat of license revocation) to sell their station to a minority for 75% of the appraised value. In return, the FCC would cease its inquiry into the license owner. Between 1978 and 1991, the FCC approved 15 distress sales. Note that both of these programs apply to the secondary market, not the initial award of a license.

Metro Broadcasting, Inc.

Reviewing the FCC's policies under intermediate scrutiny, the Supreme Court held that the FCC's policy of minority ownership and employment in comparative hearings which gave enhancement credit for minority ownership and participation and the policy of allowing "distress sales" to FCC-approved minority-owned firms did not violate equal protection under the Fifth Amendment.

The Court reasoned:

> Minority preference policies adopted by the Federal Communications Commission (FCC)-- do not violate the equal protection component of the Federal Constitution's Fifth Amendment, where Congress has enacted appropriations legislation (101 Stat 1329-31, 102 Stat 2216, and 103 Stat 1020) prohibiting the

FCC from spending any appropriated funds to examine or change its minority ownership polices, because (1) the policies in question have been mandated by Congress; (2) the interest in enhancing broadcast diversity is, at the very least, an important governmental objective; and (3) the policies in question are substantially related to the achievement of the government's interest, since (a) both the FCC and Congress--whose joint determination must be given great weight--have concluded that there is a relationship between expanded minority ownership and greater broadcast diversity, (b) this judgment is based on extensive empirical evidence rather than on impermissible stereotyping, and (c) the policies are in other relevant respects substantially related to the goal of promoting broadcast diversity...

D. Gender Ownership Policies

1. Gainesville Media, Inc.

Approximately one month after the Commission issued Statement of Policy on Minority Ownership of Broadcasting Facilities, a Review Board hearing the Gainesville Media, Inc. case reanalyzed its decision regarding female ownership credit in comparative hearings. Initially, the board held that . . .

> since there was no evidence in the record of the extent of female ownership in the mass media in Gainesville, we had no basis on which to conclude that such participation would achieve a public interest benefit. Upon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence regarding the ownership situations at other stations (see Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. Bd. 1978)).

Soon after the Gainesville decision, a review board clarified the justification and reasoning for female ownership policies. The Board concluded:

> . . . merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks--women have not been excluded from the mainstream of society as have black people (see Mid-Florida Television Corp., 70 F.C.C.2d 281, 326 (Rev. Bd. 1978), set aside on other grounds, 87 F.C.C.2d 203 (1981)).

This decision demonstrated that credit is applied for female participation in a broadcast license application, but that credit is not as significant as the credit applied for minority participation in a broadcast license application.

2. *Steele*

The Steele Court, in contrast to Mid-Florida, ruled against the use of gender policies in the comparative hearing process. [See *Steele v. FCC* 770 F.2d 1192].(D.C. Cir. 1985). Mr. Steele appealed a comparative hearing decision ruling that the gender credits provided by the FCC in the comparative hearing violated the Constitution. While not ruling on the constitutionality of the gender distinction, the court did rule that the FCC exceeded its authority in establishing the gender credits.

After rendering its decision, a majority of the judges on the D.C. circuit court agreed to rehear the case and the initial decision was vacated. Prior to the new hearing, the FCC initiated a notice of inquiry on the topic of race and gender ownership and employment policies in the awarding of broadcast licenses (Reexamination of the Commission's Comparative Licensing, Distress Sales, and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications, Notice of Inquiry, 1 FCC Rcd 1315 (1986), modified 2 FCC Rcd 2377 (1987)). The goal of this inquiry was to collect information in support of the Commission's standing policies. This inquiry was frozen in 1988 by an act of Congress (Continuing Appropriation Act for Fiscal Year 1988) and remained frozen through 1994.

3. *Lamprecht*

The early 1990's saw a movement away from the use of gender and racial ownership and employment policies in the comparative hearing process. In *Lamprecht v. FCC*, 958 F.2d 382 (D.C. 1992) the D.C. Circuit Court held that the FCC's use of gender integration as a "plus factor" in the comparative hearing setting was unconstitutional under Metro Broadcasting's intermediate level of strict scrutiny. The court asserted that the employment of generalizations concerning a particular group's behavior as contrasted with another group's behavior must be supported by evidence. The Court found that the FCC had not met this standard by demonstrating a measurable link between female participation in the day to day operation of a broadcast station and the programming choices of said station.

V. Elimination of Comparative Hearing Process

A. *Bechtel*

In 1993's *Bechtel* decision 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit Court found that the "continued application of the integration credit is arbitrary and capricious, and therefore unlawful." The court stated that the policy of extending additional credit to applicants who intended to personally manage and operate the broadcast stations was "without foundation." By invalidating the integration credit the court effectively eliminated gender and race ownership and employment policies associated with the integration credit. In 1994 the FCC suspended all active comparative hearings until an adequate resolution to the issues raised in *Bechtel* could be formulated.

The Telecommunications Act of 1996 eliminated the role of comparative hearings in the renewal of broadcast licenses. The 1994 suspension of the comparative hearing process effectively became permanent in 1997 when Congress mandated that the FCC utilize a competitive bidding process for the distribution of all future commercial broadcast license awards.[13] The first auction associated with this mandate occurred in October of 1999 and generated (unofficially) about $58 million from the distribution of 116 broadcast licenses and included several frozen license applications from the *Bechtel* ruling.

While minority ownership policies were not included in this auction process, first-time broadcasters and "small" broadcasters were accorded with auction bidding credits to assist in their bidding.

VI. Broadcast Services

Before 1965, AM radio was the primary broadcast service. Both television and FM radio were generally in the experimental stage prior to World War II and therefore, the early years of the license application process and comparative hearing process consisted almost entirely of AM radio.

A. *AM Radio*

In these early years (and still today), the AM radio license application process largely consisted of meeting technical requirements. The applicant was required to find a frequency that did not interfere with existing stations and had to meet a variety of other technical requirements. Some of the technical tests necessary to complete the application process can be complex and therefore quite expensive. In particular with AM radio, applicants must deal with the use of directional patterns and the use of different transmitter power during the day and night to minimize potential interference with other stations. Applicants were also required to demonstrate that an award in their favor would result in an "efficient and equitable" distribution of radio spectrum. For example, each applicant was required to describe the local community's broadcasting needs and how their station would meet those needs.

Once the applicant had met the technical requirements, the application for an AM radio broadcast license was listed in the Federal Register for 30 days. During this time, interested parties could file a complaint against the applicant or apply for the same license. Because the initial applicant received no preference for filing first, these rules presented a significant amount of risk for the initial applicant that they might not receive the benefits from their investment in time, effort and money spent to pass the technical requirements.

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13 See Omnibus Budget Reconciliation Act of 1993. Pursuant to this Act, the FCC received the authority to conduct auctions. Also note that competitive bidding was not required for broadcast license awards in which only one applicant expressed interest.

In cases where there was a legitimate objection to a license application from a third party or even when there was an objection from a superficially qualified competing applicant, then the license application would be redirected to a comparative hearing. If there were no competing applicants and no third party objection, then the license would be granted if the applicant had no other significant defects.

As is the case with almost all formal legal proceedings, it was possible for the interested parties to settle the dispute outside the formal proceeding. In particular, comparative hearings could be settled by the competing parties before the ALJ reached a decision. Often one of the applicants competing for a license "bought-out" the other applicants by offering money, payment of costs, cooperation or outright merger.

In the 1940s, the Federal Communications Commission (the successor to the Federal Radio Commission) created a group of 25 powerful stations operating at 50kw. Each station shared its daytime channel frequency with other stations around the country, but at sundown as the other stations left, the air the channel was clear except for the powerful stations that at night could reach distant and remote areas of the country.

In 1980, the FCC decided to end the "clear channel" protections but to protect those stations from interference for a radius of 750 miles. It allowed the clear channel stations to reach larger areas than ordinary stations, but permitted an additional 125 stations at night. The new stations were limited in power to 1 kw except in special cases, and the FCC expressly refused to allow the clear channel stations to raise their power above 50kw.[14]

International developments led the FCC to decide to reduce the congestion in the existing AM band. By allowing existing AM licensees to operate new stations in the expanded band and then after a transition period shut down their old stations, the FCC hoped to reduce interference and improve signal quality. The FCC limited the entire expanded band to the migrating AM stations.

In 1990, there was a freeze on all AM broadcast applications during the inquiry into improving AM radio. Final assignment of the new channels was delayed by petitions for reconsideration filed by the NAACP, the League of United Latin American Citizens, and the National Black Media Coalition. They asserted that "awarding 100% of the expanded band to incumbent broadcasters 'will have little or no impact on AM band interference," whereas awarding some of the expanded band to minorities would substantially alleviate the 'gross underrepresentation' of minorities in the ownership of broadcast stations." These groups proposed that incumbent broadcasters migrating to the expanded band would issue tax certificates for selling their existing band stations to minorities. The seller would retain its license for a station in the expanded band. The FCC rejected this proposal and held that its earlier decision in reducing AM congestion had to be the top priority in awarding expanded band licenses.

14 The FCC also expanded the AM band in 1979 as part of the World Administrative Radio Conference. At this time the AM band was increased in the Western Hemisphere from 525 to 1705 kHz. Agreements reached at subsequent Regional Administrative Radio Conferences limited the stations in the new section of the band to 10kw.

B. FM Radio

FM is located in the VHF band. It occupies frequencies between 88 and 108 MHZ and is allowed a broadcast range of 30 to 75 miles. That spectrum space is divided into 100 assignable channels each 200 kHz wide. The lowest 20 channels are reserved for noncommercial educational stations: the remaining 80 are for commercial use.

In 1983, in an effort to meet the increased demand for FM stations, the FCC initiated a drop-in rulemaking[15] allowing new FM stations to be started without interfering with present broadcasters. In the FM drop-in rulemaking, the FCC voted to give a preference to both AM daytime broadcasters and to minority applicants.

C. Television Stations

By the end of 1956, 395 VHF stations and 96 UHF stations were on the air. By 1960 only 75 (15%) of the 575 commercial stations on the air were UHF, even though 70 percent of the total channel assignments were UHF. The underutilization of UHF spots led the FCC to reallocate frequencies to other uses, e.g., land mobile use. In 1980, 63 percent of the television assignments were UHF.[16] The vacancy rates were as follows: 61 of the 578 VHFs; 266 of the 648 commercial UHFs. In the top 100 markets, vacancies existed on 86 UHF channels but on no commercial VHF. In the top 200 markets, the figures were 176 UHF vacancies and six VHF vacancies.

Starting in 1979, UHF stations became more attractive due to the growth and development of cable television. When received through cable, UHF and VHF stations are of comparable quality. Moreover, FCC rule changes regarding cable allowed a single television station to become a "superstation" by supplying its programs by satellite to cable systems throughout the country.

D. Differences between AM, FM and TV

The television and FM radio license application process had a few important differences from the AM radio license. Technically, television and FM licenses were less complicated and therefore less expensive to apply for. In particular, the guidelines associated with the assignment of frequency and distance separation of stations is relatively straight-forward given that both of these services broadcast on a "line-of-sight" principle and are not subject to the same impact that the ionosphere inflicts upon AM transmission. Rules for the separation of television and FM stations are even listed clearly in the Code of Federal Regulations (47 CFR Part 73). Further, the Commission had allocated television and FM "channels" to cities, which as a result frequently eased the search for an open frequency. As with AM radio license applications, the initial application for a particular FM radio license was listed in the Federal Register for 30 days. Again, during this listing period additional license applicants could enter the process or a third party, not associated with an applicant, could object to any of the applications. In particular, an incumbent radio station could have objected to an application on the basis that the market in question could not economically

[15] See 94 F.C.C.2d 152; June 14, 1983 Released; Adopted May 26, 1983

[16] UHF stations are more expensive to operate because it takes 10 times as much power for a UHF transmitter to reach the same area as a VHF transmitter.

support another station or if they felt that the new station would improperly interfere with their signal. Mutually exclusive licenses would eventually be resolved through the comparative hearing process. Also, similarly to AM stations, these mutually exclusive applicants could settle their case prior to an ALJ decision.

VII. Evolution of Ownership Rules

As discussed previously, diversification of control of mass media was of primary importance as a factor in the comparative hearing process. Therefore the ownership rules had a very significant effect on determining who could apply for a broadcast license. This section describes the chronology of the ownership rules as they have evolved since the early 1940s.

The only information that we have seen regarding rules prior to the 1950s pertains to the breakup of RCA in the early 1940's. Resulting from the Chain Broadcasting Report, the FCC, with the blessing of the Supreme Court, ordered RCA, which owned two separate NBC radio networks (the Red and Blue networks), to divest the Blue network to Edward Noble (the Blue network would eventually become ABC). In response to the dramatic growth in broadcast outlets and their growing influence in the transmission of information to society in addition to the possibility of a firm controlling too much of an area's media, the FCC introduced its first set of ownership rules in the 1950s.

In its role of ensuring that a diversity of viewpoint exists, the FCC has the authority to determine how many stations a single person or group may control and at times has determined what percentage of the audience a single person or group may achieve. The limits on ownership have changed over the years as prevailing views have changed on just what constitutes too little diversity or too much control of the media. Also impacting these prevailing views has been the increase in media outlets in most markets, from new radio and television stations to cable/satellite television to now the Internet. Until recently, though, the limits on the local ownership of media outlets did not vary according to the size of the market that the station is trying to reach. In effect, the local ownership constraints were "one size fits all."

The logic for the ownership limitation were reaffirmed in a number of judicial decisions. For example, in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), the United States Court of Appeals for the District of Columbia observed that "public interest, convenience, and necessity" would be best served if licenses were owned by a diverse set of people. The court stated:

> Since one very significant aspect of the 'public interest, convenience, and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one of the applications before it.

While this decision reflected the belief that ownership should not be concentrated in the hands of a few, it also reflected the belief that even a diffuse ownership did not necessarily fulfill the public need for a diversity of viewpoint. In this decision, the court also recognized the disparity between the number of licenses held by minorities versus the number of licenses held by non-minorities.

> "As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. .... While no quota system is being recommended or required, and while the fairness doctrine no doubt does serve to guarantee some minimum diversity of views, we simply note our own approval of the Commission's long-standing and firmly held policy in favor of decentralization of media control. Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing. For two strong statements by the Commission itself on the importance of diversification, see Bamberger Broadcasting Service, Inc., 3 Pike & Fischer R.R. 914, 925 (1946), and Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 & n. 4 (1965)."

Table 1 shows the ownership limits and how they have changed from 1950 to today. From 1950 until 1970, any single person or group could own 1 AM and 1 FM station and 1 television station in a local market. For the national market, the limits were 7 AM and 7 FM and 7 television stations, of which only 5 could be VHF. There was no limitation on cross ownership during this period. During this period, owners of an AM station frequently applied for and/or purchased FM and television stations to complement the AM station that they already owned in the market.

The 1970s introduced cross-ownership rules to stimulate the growth in diversity in the media. First in 1970, the Commission prohibited the cross ownership of radio and TV facilities in a city. Later in 1975, the Commission extended the cross-ownership prohibition to newspapers and broadcast facilities. In both cases, the new rules prohibited new combinations, but grandfathered prior combinations. To encourage breaking up pre-existing cross ownership situations, the FCC offered the use of tax certificates which provided some monetary incentives for owners holding a variety of media interests to voluntarily divest. In some occasions, interested parties challenged the broadcast licenses of firms that had not voluntarily divested of some properties.

In contrast to the more stringent regulations with respect to cross ownership of local media, the local and national ownership regulations regarding television and radio stations have, in general, become less stringent over time. Since 1985, there has been a gradual relaxation of the restrictions on the number of radio and TV stations that can be held in both local and national markets, with dramatic rule shifts in 1992 and 1996. Today, the number of stations per market now depends on the number of stations in the overall local market (although both the Department of Justice and the FCC frequently review the share of advertising revenue held by the merged firm before approving of any transaction). For the national market, there has been a gradual increase in the number of stations until finally in 1996 there is now no limit on the number of stations that can be held nationally (although, firms cannot own television stations that serve more than 35% of the nation's population).

With respect to cross ownership rules, there has also been some gradual increase in flexibility. By 1985, the FCC began granting occasional waivers (such as in the case of Capital Cities purchase of ABC in which Capital Cities was allowed to maintain cross ownership of radio and television stations in several markets), allowing some degree of cross ownership of TV and radio stations and between broadcast stations and newspapers. As recent as this year, the FCC has begun to liberalize the rules prohibiting cross ownership and has formally relaxed the prohibition so that cross ownership between radio and television stations can occur in markets where there are at least a minimum threshold number of media outlets. The relaxation of cross ownership restrictions has so far not been extended to joint ownership of TV and newspapers, or radio and newspapers.

Table 1. Local, National, and Cross Ownership Rules (1950 – 1999)

Year		Local Market	National Market	Cross Ownership Rules
1950	Radio	1 AM and 1 FM	7 AM and 7 FM	None
	TV	1 TV	7 TV of which only 5 can be VHF	
1970		Prohibit ownership of radio and TV stations in the same market. Grandfathered existing cross ownership.	Same as 1950	Prohibit ownership of radio and TV stations in the same market. Grandfathered existing cross ownership.
1975		Same as 1970	Same as 1970	Additional prohibition of ownership of TV and newspapers in same market. Grandfathered existing cross ownership.
1985	Radio	1 AM and 1 FM	12 AM and 12 FM; plus 2 additional AM and FM if they are controlled by Minorities or small business.	Same as 1975. However, waivers occasionally granted.
	TV	1 TV except could add a 2nd if it was a satellite of the first.	12 TV plus 2 TV if they are controlled by minorities or small business. TV Stations may reach no more than 25% of population. UHF receive 50% credit in population determination.	
1989	Radio & TV	Same as 1985.	Same as 1985.	The Commission adopted ruling that relaxed previous rulings prohibiting cross ownership of TV and Radio. The FCC adopted a waiver policy permitting many Radio-TV combinations. (for summary See MM Docket No. 91-221. Released Aug. 5, 1999)
1992	Radio	In markets with 15 or more stations, 2 AM and 2 FM as long as the combined Share of audience is less than 25%. In Markets with less than 15 stations, 3 Stations with no more than 2 as AM or FM as long as it has no more than 50% of market's stations.	18 AM and 18 FM; plus a non controlling attributable interest in 3 AM and 3 FM if they are controlled by minorities or small business.	Same as 1989
	TV	Same as 1985.	Same as 1985.	
1994	Radio	Same as 1992	20 AM and 20 FM plus a non controlling attributable interest in 3 AM and 3 FM if they are controlled by minorities or small business.	Same as 1989
	TV	Same as 1985	Same as 1985	
1996	Radio	In markets with 45 or more stations, 8 Stations with no more than 5 in either AM or FM. In markets with 30-44 stations: 7 radio with no more than 4 in either service. In markets with 15-29 stations: 6 radio stations with no more than 4 in either service. In markets with fewer than 15 stations: 5 radio stations with no more than 3 in	No limit No limit, as long the stations do not serve	Same as 1989

		either service.	more than 35% of the nation's population UHF receive 50% credit in population determination	
	TV	Same as1985		

Table 1. Local, National, and Cross Ownership Rules continued

Year		Local Market	National Market	Cross Ownership Rules
1999	Radio	Same as 1996	Same as 1996.	If the market has at least 20 separately owned broadcast, newspaper, cable "voices:" 2 TVs and 6 radio stations or 1 TV and 7 radio stations. If the market has at least 10 separately owned broadcast, newspaper, cable "voices:" 2 TV and 4 radio. 1 TV and 1 radio allowed everywhere. TV/Newspaper cross-ownership remain prohibited (for now).
	TV	Two TV stations in market if the second outlet is: Financially troubled[17], not yet built, or is not among the market's 4 top-rated stations at time of purchase and 8 independently owned TV stations remain. An owner may *also control overlapping stations if* they are based in different designated market areas.	Same as 1996 but in markets where firms own 2 TV: doesn't double count towards 35% of nationwide population limit.	

Source: FCC Records and case law: After 1950, only policy changes are presented in the table. Where "same" is indicated, the same limits exist as have existed in previous periods.

VIII. Recent Developments

Adarand and *U.S. v. Virginia*

After the suspension of the comparative hearing process due to the *Bechtel* decision, but before the implementation of the broadcast license auctions, two important court cases were decided which will impact the ability of the FCC to implement minority and female ownership and employment policies in the future.

In the 1995 *Adarand* decision [515 U.S. 200 (1995)], the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision making must serve a compelling governmental interest such as remedying past discrimination and must be narrowly tailored to serve that interest. Furthermore, the court ruled that any racial distinctions employed by a local, state, or the federal government "must be analyzed by the reviewing court under strict scrutiny," specifically overruling the standard of review used in *Metro Broadcasting*.

17 At least one of the following conditions must apply:1) Station has been off the air for at least four months (because of financial difficulty) and the buyer is the only "reasonably available" entity willing to operate the station: 2) the station has an audience share below 4%. 3) station is in poor financial condition (negative cash flow for the previous 3 years); 4) there is proof of no out of town buyer: 5) there is a demonstration of "tangible and verifiable" public-interest benefits beyond mere cost savings and efficiencies.

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court considered the distinctions made by local, state, and the federal government with respect to gender. In this case the court reaffirmed that these gender distinctions need only satisfy "intermediate scrutiny". While the definition of intermediate scrutiny is somewhat vague, it is clear that intermediate scrutiny is a lower standard than strict scrutiny.

IX. Conclusion

As described above, the history of the license application process has been subject to many changes over the years. Continuous changes in ownership regulations, and minority and female ownership and employment policies have occurred throughout the period. The 1960s and the 1970s saw an increase in minority and gender policies. The basis for many of these policies were court rulings that reversed comparative hearing results. Yet, it was not until 1978 when the comparative hearing process specifically outlined the use of minority ownership policies and the introduction of other programs aimed to spark minority interest in the secondary license market. Since this date, however, the constitutionality of minority and gender ownership policies have become more uncertain and can be implemented only under more rigorous circumstances.