

MB 04-228

KAYE SCHOLER LLP

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The McPherson Building
901 Fifteenth Street, N.W.
Washington, D.C. 20005-2327
202 682-3500
Fax 202 682-3580
www.kayescholer.com

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Federal Communications Commission
Office of the Secretary

September 10, 2004

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SEP 13 2004

Federal Communication Commission
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MEDIA BUREAU

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SEP 16 2004

MEDIA BUREAU

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: DA 04-1690

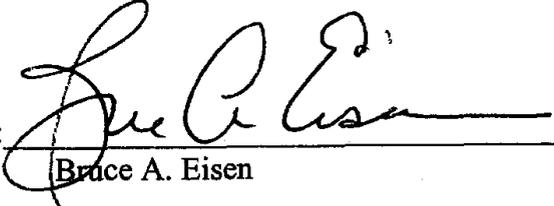
Dear Ms. Dortch:

On behalf of Spanish Broadcasting System, Inc., we are herewith filing an original and four (4) copies of its "Comments on FCC Section 257 Mandate."

Should there be any questions concerning this matter, kindly communicate directly with undersigned counsel.

Respectfully submitted,

KAYE SCHOLER LLP

By: 
Bruce A. Eisen

Enclosure

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

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OCT 21 2004

MEDIA BUREAU

In re)
)
Elimination of Market Entry Barriers for) DA 04-1690
Small Telecommunications Businesses)
and Allocations of Spectrum-Based Services)
for Small Businesses and Businesses Owned)
by Women and Minorities)

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SEP 16 2004

MEDIA BUREAU

TO: Chief, Media Bureau

COMMENTS ON FCC SECTION 257 MANDATE

Spanish Broadcasting System, Inc. ("SBS"), by its attorneys, hereby submits its comments with regard to the Media Bureau's ("Bureau") Public Notice, MB Docket No. 04-228, DA 04-1690 (MB June 15, 2004) ("Public Notice"). In support thereof, the following is shown:

1. The Public Notice requests comments on constitutionally permissible ways to further the mandates of Section 257 of the Federal Communications Act of 1996 (47 USC §257), which directs the Commission to identify and eliminate market entry barriers for small telecommunications businesses. Just as importantly, the Bureau cites Section 309(j) of the Communications Act of 1934, as amended, (47 USC §309(j)) which requires the Commission to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities.

2. SBS is a radio broadcaster which is presently the second largest operator of Spanish-language radio stations in the United States. SBS is the licensee of approximately 20

radio stations in the United States and Puerto Rico. Among its stations are WSKQ-FM in New York City (the No. 1 station among Hispanic listeners ages 18-49 in its market) and KLAX-FM in Los Angeles. As a substantial and still growing Spanish-language broadcaster, SBS has a clear interest in the goals set forth in the Public Notice.

3. The Public Notice references several studies conducted pursuant to the Telecommunications Act of 1996 and the Communications Act of 1934, as amended. These studies were released by the Commission in December, 2000 and the Bureau has asked the public to consider them in filing its comments. One of the studies, "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes" concludes that discrimination in capital markets has reduced the ability of minority and women-owned firms to win licenses through FCC auctions which require up-front payments and which grant permits to the highest bidder. In other words, the study indicates that where there is discrimination in access to capital minorities and women are less likely to qualify for any auction and less likely to prevail as the winning bidder. Clearly, the lack of adequate capital is a critical barrier to entering the broadcast business.

4. A second study, "History of the Broadcast License Application Process" sets forth some of the history of FCC regulation. It observes that in the late 1960s the FCC began to pay attention to race and gender so that by the mid-1970s the agency began to give applicants credit in certain proceedings on the basis of gender and race. In a 1978 Policy Statement on Minority Ownership, the FCC formalized the use of minority enhancements in comparative hearings and also implemented two programs favoring minority ownership by helping minorities to acquire licenses in the secondary market. One of these policies provided tax certificates to assignors and transferors of broadcast facilities who sold their stations to minority controlled entities.

However, by the early 1990s, the idea of gender and racial enhancements in the comparative hearing process lost ground as a result of several court decisions. In Lamprecht TV v. FCC, 958 F2d 382 (D.C. Cir. 1992), the Court held that the FCC's use of gender integration as a plus factor in comparative hearings was unconstitutional without evidence of female participation in programming choices and the station's day-to-day operation. In 1993, the D.C. Circuit found that the continued application of the integration credit was arbitrary and capricious and, therefore, unlawful. See, Bechtel v. FCC, 10 F3rd 875 (D.C. Cir. 1993). These decisions significantly diminished the effectiveness of the Commission's minority ownership policy.

5. The two studies cited, supra, reveal a tension between past goals and policies. On the one hand, the first study points to discrimination in capital markets, and although that study largely addressed FCC auctions, it is surely no great leap to understand that capital available to minority buyers is also extremely difficult to find. The second study references past FCC policies implemented to increase minority involvement in the broadcasting industry which, for all their good intentions, had been struck down by the courts on constitutional grounds. Hence, the policies concerned with entry into the industry through the purchase of existing facilities, i.e., tax certificates and distress sales were judicially set aside. The Bureau has noted, therefore, in its Public Notice, that it is incumbent upon any commentor to also address the Supreme Court decisions in Grutter v. Bollinger, 539 U.S. 306 (2003) and Gratz v. Bollinger, 539 U.S. 244 (2003).

6. The two Supreme Court cases involved the University of Michigan and the requirement that an educational institution "narrowly tailor" the use of race in its admissions policy. Taken together, the cases hold that diversity can indeed constitute a compelling state interest, but that a policy that guarantees admission to all under-represented minorities solely

because of race would not be “narrowly tailored.” In particular, the Court held in Grutter that the University of Michigan law school’s use of race in admissions decisions furthered a compelling interest in obtaining the educational benefits that flow from a diverse student body, and that such use was not prohibited by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹

7. SBS believes that the goals embodied by the Public Notice can be advanced by, inter alia, implementation of a new tax incentive policy that conforms to the U.S. Supreme Court decisions. Until it was repealed, Section 1071 of the Internal Revenue Code gave the Commission the power to issue tax certificates dependent upon its finding that a sale or exchange of property was “necessary and appropriate” to effectuate the adoption of a new policy or a change in an existing policy relating to the ownership and control of broadcasting properties. As a result, the Commission through a series of modifications in 1978 made tax certificates available to transactions that furthered minority ownership. The tax certificate enabled the seller to defer gains realized by the sale, an important incentive to seek out and sell to a minority purchaser. Under the policy, the Commission held that tax certificates would be issued in circumstances where minority ownership in the purchaser represented at least 50% of the total ownership interest.

8. In 1995, Congress eliminated the tax certificate policy. Since its repeal and the passage of the Telecommunications Act of 1996, there has been a precipitous drop in the amount

¹ The Court held in Gratz that a selection method whereby every applicant from an under-represented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission was not “narrowly tailored” and violated the Equal Protection Clause. In Grutter, the Court held that an admissions policy that considers race or ethnicity only as a “plus” in a particular applicant’s file, together with his or her other qualifications, was not prohibited by the U.S. Constitution.

of minority broadcast ownership. There have been, within the past few years, several bills introduced in the Senate and the House to restore tax incentives that promote ownership of telecommunications properties by minorities and women. These bills have not, however, moved forward with the kind of speed that had originally been anticipated. SBS strongly supports the idea of tax incentives to enhance the policies that are the subject of the Public Notice. Since 1994, SBS has worked with several minority-owned broadcasters in an attempt to restore these tax incentives. SBS is uniquely positioned to take a leadership role promoting diversity in broadcasting and to support other initiatives aimed at increasing diversity in the industry. It urges the Commission to actively support Congressional initiatives to restore these tax programs.

9. Senate Commerce Committee Chairman McCain (R-AZ) has been instrumental in drafting legislation proposing new tax incentives to encourage minority ownership in telecommunications facilities. Senator McCain's bill² provides for tax deferrals that would extend beyond broadcast sales to include any business engaged in electronic communications as its primary purpose.³ Eligibility under the McCain bill would include small and minority-owned businesses, as well as individuals who are women and members of racial minority groups. The bill would enable the federal government to take into account historical factors such as the inability of some groups to have access to capital. In this manner, the bill would promote diversity in the licensing of telecommunications facilities, a prime consideration set forth in the Public Notice. The bill would encourage companies to sell communications properties to women

² S.267, the "Telecommunications Ownership Diversification Act of 2003." Its House counterpart is H.R. 2044, introduced by Congressman Rush (D-II).

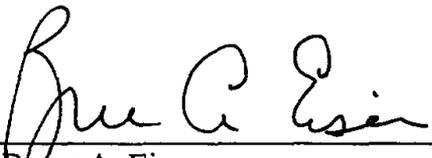
³ The bill includes cable systems, radio and television stations, direct broadcast satellite services, providers of video programming, providers of commercial mobile services, telecommunications carriers, providers of fixed satellite services, resellers of communications or commercial mobile services, and providers of MMDS.

and minorities through the provision of appropriate tax incentives. In addition to enhancing competition, the bill would promote ownership by individuals who are currently under-represented in the ownership of telecommunications companies, including (but not limited to) minorities and women, by making carefully crafted changes in the tax code that conform to the recent Supreme Court decisions.

10. SBS believes that the Commission should support tax incentives whether in the form of the McCain or Rush bills, or another bill that would serve the same purposes that the Public Notice endorses, i.e., a constitutionally permissible way to eliminate market entry barriers and to further opportunities for small businesses and businesses owned by women and minorities.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM, INC.

By: 

Bruce A. Eisen
Its Attorney

KAYE SCHOLER LLP
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

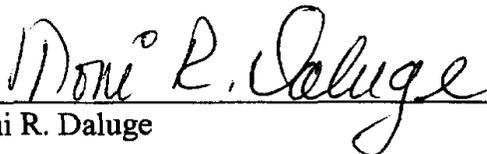
September 10, 2004

CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary in the law firm of Kaye Scholer LLP, do hereby certify that on this 10th day of September, 2004, copies of the foregoing "Comments on FCC Section 257 Mandate" were hand-delivered to the following:

Best Copy & Printing, Inc. (2 copies)
Portals II
445 Twelfth Street, S.W.
Room CY-B402
Washington, D.C. 20554

Linda Senecal (3 copies)
Federal Communications Commission
445 Twelfth Street, S.W.
Room 2C-438
Washington, D.C. 20554



Toni R. Daluge