



Minority Media & Telecommunications Council
3636 16th Street N.W. Suite B-366
Washington, D.C. 20010
Phone: 202-332-0500 Fax: 202-332-0503
www.mmtconline.org

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January 26, 2007

Hon. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Ms. Dortch:

RE: Notice of *Ex Parte* Communication, MB Docket No. 06-121 (Media Ownership)

On behalf of the Diversity and Competition Supporters (“DCS”), this reports on my response to a question asked by Rudy Brioche, Legal Assistant to Commissioner Adelstein, at a meeting on the subject of advertiser discrimination held January 25, 2008 (*ex parte* report to be submitted separately) and a telephone call the same day. The question was what enforcement paradigm would be most effective and would accurately reflect the terminology and contractual paradigms used in broadcast advertising. It’s vital that the Commission get this right, since its December 18, 2007 unanimous vote to ban broadcast advertising discrimination – if implemented wisely – promises to be the most significant new federal civil rights initiative in the past 30 years.

One enforcement approach would require only that no-urban or no-Spanish dictates (collectively “NUDs”) not be contained in advertising sales contracts. That approach would have no impact whatsoever, because since the 1950s ad sales contracts have never expressly contained NUD language. In modern advertising practice, a NUD is an internal instruction (usually oral but sometimes written) given by an advertiser to its ad agency or observed by an advertiser individually, by which the advertiser refuses on explicit or implicit racial grounds to place business on urban or Spanish radio or television stations or programs. Thus, a contract between a broadcaster and an advertiser or its agency is always silent on whether a NUD was used to constrain the choice of broadcasters with which to contract for a media buy. Therefore, every broadcaster could certify today that its ad sales contracts contain no NUD language, and every such certification would be meaningless.

Further, NUDs are not the only forms of advertiser discrimination. An equally invidious practice is advertisers’ use of racial stereotypes to demand inferior schedules and rates of stations serving African American and Hispanic audiences. Like NUDs, this discriminatory practice distorts the marketplace and frustrates the Commission’s ability to ensure that the public receives diverse, quality broadcast service.

The least intrusive and most effective way to proscribe all forms of advertising discrimination would be a requirement that within a reasonable time after finality of the R&O (e.g. within 90 days) a broadcaster’s ad sales contracts must contain a nondiscrimination clause. The Commission need not provide the clause’s wording. A model for this approach is found at 47 C.F.R. §73.2080(c)(4)(vi), whose unambiguous, easily understood language provides that “where union agreements exist” a station employment unit must “include an effective nondiscrimination clause in new or renegotiated union agreements[.]” Since this language does not create a racial classification and it is content neutral, it would be subject to and easily sustained under rational basis review.

Sincerely,

David Honig

David Honig
Counsel for the Diversity and Competition Supporters