

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Promoting Diversification of Ownership In the Broadcasting Services)	MB Docket No. 07-294
)	
2006 Quadrennial 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. 06-121
)	
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
)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies)	MB Docket No. 04-228
)	

To: The Commission, Office of the Secretary

PETITION FOR RECONSIDERATION OR CLARIFICATION

By its attorneys and pursuant to Section 1.429 of the Commission’s Rules, the National Association of Media Brokers (“NAMB”) hereby seeks reconsideration or clarification of the new rule adopted by the Commission in the above-captioned proceeding barring discrimination

in broadcast transactions. By its *Report and Order*,¹ the Commission adopted a rule that “bars discrimination on the basis of race or gender and related protected categories in broadcast transactions.”² In order to confirm compliance with the rule, applicants seeking Commission consent to the assignment or transfer of control of a broadcast license will be required to certify on their application to the FCC that they have complied with this ban on discrimination in station sales. While the NAMB fully supports the Commission’s goals of encouraging minority ownership and barring discriminatory practices in the sale of broadcast stations, NAMB is concerned that the *Report and Order* does not provide sufficient guidance to allow licensees to comply with the rule, such as examples of prohibited or permitted practices, or to properly make the necessary certification. Because it is feared that the rule without specification could lead to regulatory disputes over its meaning to the detriment of parties conducting broadcast transactions, NAMB respectfully requests that the Commission clarify this new rule.

Background and Introduction

The NAMB is a trade association whose members are the media brokers who facilitate the purchase and sale of radio and television stations, and who assist in the structuring and financing of such transactions. Through involvement in the vast majority of broadcast transactions, the members of the association have extensive knowledge of the mechanics and economics of the industry, and of individual stations and the markets in which they operate. As its members are actively involved in the sale and acquisition of broadcast stations, the NAMB is

¹ *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-217 (rel. Mar. 5, 2008 (“*Report and Order*”). Notice of this Commission action was published in the Federal Register on May 16, 2008. 73 FR 28,361. Accordingly, this Petition is timely filed pursuant to 47 CFR §§ 1.4; 1.429.

² *Report and Order* at ¶¶ 40-42.

uniquely positioned in the industry and its members will be called upon to advise their clients about this new rule in future transactions. The NAMB fully supports the Commission's goal of increasing diversity in the broadcasting industry by increasing participation by new entrants and small businesses, including minority- and women-owned businesses. However, as currently formulated, the parameters of the certification that will be required by parties selling their stations are difficult to define. Without further guidance, the rule cannot be implemented in any meaningful way, and applicants cannot certify with certainty that they have complied with the rule's strictures. Moreover, given the broad nature of the certification with little description of what is meant by that certification, the NAMB fears that disappointed potential buyers or other parties could use the language of the rule to argue that a particular sale was not properly conducted – thus potentially leading to needless delays in the processing of applications. Therefore, clarification is hereby sought from the Commission to assist licensees with compliance and to ensure that the Commission's diversity goals are achieved.

Discussion

The ban on discrimination in broadcast transactions adopted by the *Report and Order* states, in its entirety:

No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part).³

The *Report and Order* goes on to state that “sellers will be required to certify compliance with this rule against discrimination by checking a box on Form 314 or 315 applications.”⁴ Beyond this simple statement of the new rule and a brief discussion of its origins and the Commission's

³ *Report and Order* at ¶ 40.

⁴ *Id.* at ¶ 42.

authority to adopt it, the *Report and Order* provides no guidance regarding the implementation of the rule, and how applicants are to determine their compliance in order to make the necessary certification to the government. For example, the *Report and Order* does not address whether affirmative steps need to be taken to obtain a diverse pool of potential buyers, or how the rule applies in the context of a private sale, *i.e.* a sale that is not offered publicly or widely disseminated. Similarly, the *Report and Order* does not provide guidance on whether there are specific practices that are prohibited under this new rule.

The Commission cites to three sources in the record as the origin for this new rule, however, other than to state broadly that these parties “advocate that the Commission take action in this area,” the *Report and Order* does not discuss the comments or the proposals set forth by those sources, or whether the proposals made by these parties as to the scope and reach of the rule were accepted by the Commission.⁵ The rule seems to have first been articulated by the Minority Media and Telecommunications Council (“MMTC”) and the Diversity and Competition Supporters (“DCS”) (together “MMTC/DCS”) in the Commission’s rule making proceeding regarding the *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. In its 2003 comments, MMTC/DCS proposed that the Commission adopt an “Equal Transactional Opportunity” policy.⁶ MMTC/DCS’s 2003 comments discussed the realities and mechanics of the sale of broadcast

⁵ *Report and Order* at ¶ 40. Specifically, the *Report and Order* cites to the comments filed by the Diversity and Competition Supporters, the recommendations of the Advisory Committee on Diversity, and the comments filed by Consumers Union, et al. In total, the *Report and Order’s* discussion of the new rule comprises three short paragraphs.

⁶ Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed Jan. 2, 2003).

stations, and suggested that the Commission adopt a rule to ensure that the industry operates in a nondiscriminatory manner in transactions.

Subsequently, in 2004, the Advisory Committee on Diversity (“Advisory Committee”) expanded on MMTC/DCS ’s suggestion, and issued a recommendation to the FCC suggesting the adoption of an Equal Transactional Opportunity Rule.⁷ The Advisory Committee produced a detailed recommendation, which explained the goal behind the rule and the Commission’s authority to adopt such a rule, as well as specific details of the proposed rule, including prohibited practices and permitted practices.⁸ For example, the detailed recommendation stated that the licensee could continue to choose whether or not to widely disseminate the availability of a broadcast station, so long as the methods used to solicit or consider buyers were nondiscriminatory.⁹ Private sales could occur without any need for wide dissemination of the availability of the station, as long as the determination of whom to offer the station to was not made in a discriminatory fashion. The recommendation also provided additional guidance, including the suggestion that intentional discrimination in marketing and intentional discrimination in the consideration of an offer would be explicitly prohibited, but that specific outreach efforts would not be necessary.¹⁰ In adopting the rule, however, the Commission’s recent *Report and Order* does not draw on or discuss any of the specifics offered in the Advisory

⁷ Advisory Committee on Diversity, *Transactional Transparency Recommendation* (May 14, 2004).

⁸ Transactional Transparency and Outreach Subcommittee Recommendation to the FCC’s Advisory Committee on Diversity for Communications in the Digital Age, *Adoption of an Equal Transactional Opportunity Rule* (June 14, 2004).

⁹ Id. at 3.

¹⁰ Id. at 3-4.

Committee’s recommendation, but instead simply cites to the Committee’s recommendation generally.

More details about the proposed rule were also contained in the MMTC/DCS comments submitted in response to the Commission’s Second Further Notice of Proposed Rule Making in the *2002 Biennial Regulatory Review* of its broadcast ownership rules.¹¹ There, the “Equal Transactional Opportunity” rule was the first proposal presented in MMTC/DCS’s comments.¹² MMTC/DCS discussed the application of the proposed rule in greater detail, and suggested that “a Report and Order adopting the proposed rule could give guidance on specifically prohibited or permitted practices.”¹³ The comments offered four examples of practices that should be prohibited under such a rule, including deliberately not considering offers from certain parties because of their race or gender, or constructing a solicitation list of potential buyers that specifically excludes women and minorities (simply because of their race or gender) that the broadcaster knows to be at least as qualified as others on its list.¹⁴ Additionally, MMTC/DCS noted that the pro-active recruitment or training of minority or women purchasers would be consistent with the rule, but would not be required under the proposed rule.¹⁵ NAMB believes that such common sense limitations of the reach of the rule are necessary so as to not unduly

¹¹ *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*, Second Further Notice of Proposed Rule Making, MB Docket No. 06-121, et al., 22 FCC Rcd 12215 (2007) (“*Second Further Notice*”).

¹² Initial Comments of Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rule Making, MB Docket No.06-121 et al. (filed Oct. 2, 2007).

¹³ Id. at 6.

¹⁴ Id. at footnote 29.

¹⁵ Id. at 6.

burden the transactional market in broadcast stations. Once again, however, despite the fact that the main proponent of this new rule offered examples of permitted and prohibited practices and urged the Commission to provide parties with guidance if and when the proposed rule prohibiting discrimination in transactions were adopted, the Commission's recent *Report and Order* is devoid of such guidance, leaving licensees and future applicants in the dark about how this rule will operate in the real world and whether the common sense proposals of the MMTC/DCS Comments were favorably adopted.¹⁶

Conclusion

For the foregoing reasons, the NAMB respectfully urges the Commission to clarify its newly adopted rule banning discrimination in broadcast transactions. Applicants and licensees need further details if they are to comply with the rule in any meaningful way and certainly before they are required to certify to the federal government that they have complied with the regulation. As the rule stands now, without further guidance applicants would not know what exactly they are certifying to in responding to the question on an FCC Form 314 or Form 315. Although the initial proponent of the rule and the Advisory Committee each offered details about the proposal and suggestions as to prohibited and permitted practices, the *Report and Order* fails to provide any guidance for the real world application of the rule. The one sentence rule reads more like an abstract statement of goals and aspirations, than a regulation establishing a very specific certification to be made by applicants under penalty of perjury. Accordingly, the

¹⁶ The third commenter cited by the *Report and Order* in support of the new rule is Consumers Union, et al., whose comments simply state: "We strongly support Proposal #1, the 'Equal transactional opportunity policy', which explicitly bans discrimination on the basis of race or gender in broadcast transactions." Comments of Consumers Union, et al., in Response to the Second Further Notice of Proposed Rule Making, MB Docket No.06-121 et al. (filed Oct. 1, 2007) at 30.

