

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

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| In the Matter of |) | |
| |) | |
| Policies to Promote Rural Radio Service and to |) | MB Docket No. 09-52 |
| Streamline Allotment and |) | FCC 10-24 |
| Assignment Procedures |) | |

To: The Commission

COMMENTS OF CATHOLIC RADIO ASSOCIATION

The Catholic Radio Association (“CRA”), by counsel, hereby submits its Comments on a *Further Notice of Proposed Rule Making* in the above-captioned proceeding (the “*Rural Radio FNPRM*”),¹ in which the Commission sought proposals regarding the possible expansion of a preference intended to increase radio service in sparsely populated regions. In particular, CRA wishes to address “whether and how Tribes without tribal lands . . . can qualify for the Tribal Priority.”²

The CRA opposes a regulatory regime wherein descendants of the indigenous tribes living in pre-colonial America (for convenience, we reference such persons hereinafter as “American Indians”) are afforded a preference over descendants of ethnic, racial, or national identities less fashionable among elites. Moreover, we oppose expansion of the tribal priority to American Indians without governance of a specific

¹ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, MB Docket No. 09-52, RM-11528, 47 Fed. Reg. 73 (Mar. 4, 2010) (“*Rural Radio FNPRM*”).

² *Id.* at ¶¶ 67-69.

geographic area (a “Reservation”). Such a broadening of the preference would (a) prove inconsistent with the theory that the Commission employed to distinguish the tribal preference from unconstitutional race-based preferences, (b) exceed the scope of permissible government preferences for American Indians, and (c) violate the First Amendment protections against viewpoint discrimination and even establishment of religion.

BACKGROUND

The CRA serves as the trade association for radio station licensees and applicants (among others)³ who provide, or who wish to provide, Catholic programming in their local communities. The Catholic radio format presents a genuine opportunity to dramatically increase the availability of a unique radio format not historically present in most communities. Although most noncommercial educational formats air inspirational music from a religious perspective or news-talk programming from a secular perspective, Catholic radio offers listeners a predominantly talk format that is both intellectually robust and profoundly influenced by faith. This programming format is uniquely responsive to listeners and fills a void for this underserved minority that other broadcasters fail to meet.

³ Working on behalf of official Church institutions, as well as ministries founded and operated by lay members, CRA supports the efforts of Catholic radio programming producers, distributors, and broadcasters alike. Association members include not only broadcast licensees but also program providers and several (Arch)dioceses. An Episcopal Advisory Board supports CRA’s efforts to operate in a manner true to the inherited body of authoritative Catholic teachings.

COMMENTS

In considering the possibility of extending a tribal preference, the agency accepted the reasoning from a resolution submitted by the National Congress of American Indians. Specifically, the Commission adopted the theory that tribal-owned radio stations have the potential to “support several fundamental missions of Tribal entities within their communities, which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and prov[id]ing a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life.”⁴

CRA members – and indeed most Americans – believe that we are a people “of all nations.”⁵ We therefore greet with great trepidation any regulatory scheme that proceeds from the flawed premise that some groups -- defined on racial or ethnic grounds – will prove more responsive to the distinct concerns of members of the same race or ethnicity. The ongoing rebuttal of truth claims premised on common racial or ethnic identity has been an important component of American history, as has been the competition of political advocates and faith communities in the marketplace of ideas. We fear the new

⁴ See *Joint Comments of NPM/NCAI* at attachment, The National Congress of American Indians Resolution #NGF-09-007, Establishment of a Tribal Priority for Broadcast Spectrum Allocations at the Federal Communications Commission, FCC Docket 09-30.

⁵ In the Gospel account of Matthew, Jesus encounters his disciples after his resurrection from the dead, saying: "All power in heaven and on earth has been given to me. Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Spirit, teaching them to observe all that I have commanded you. And behold, I am with you always, until the end of the age." Matt 28: 18-20.

tribal preference ignores the lessons learned from both of these threads in the American legacy.

I. Expanding the Preference Undermines the Agency's Initial Premise.

Although the Commission has found a disparity in the number of radio stations that American Indian tribes operate relative to their populations, the record reveals no evidence that this disparity is a function of Tribes' inability to compete successfully within the existing regulatory regime. It is equally plausible that American Indian tribes simply have been less aggressive with respect to seeking broadcast spectrum rights over the years than have other groups.

Indeed, Catholics lag far behind their evangelical brethren in bringing radio service to the nation's largest single religious denomination. By this measure, Catholic applicants should be entitled to the greatest preference of all. We seek no such preference precisely because we recognize that some groups have simply been more slow to take advantage of opportunities in broadcasting, and because the notion of a preference for one particular racial or ethnic category offends not only our view of the constitutional protections afforded to all but also the universal truth claims of our faith. The idea that one ethnicity may be less well served by religious programming that appeals to the person without regard for identity politics is repugnant to most Americans, including CRA members, who seek to serve no particular ethnic group to the detriment of any other.

The Commission has so far avoided the lack of a connection between the perceived inequity and the proposed remedy. It has done so in large part by focusing on

the constitutional authority of the federal government to facilitate improved government of tribal Reservations, which enjoy semi-sovereign status.⁶ We hereinafter reference this as the “Initial Premise”.

No such distinction is available to save a preference for those who merely claim a genetic lineage that includes American Indians, or even a tribe that does not govern a Reservation. Such tribes are not distinguishable from other racial, ethnic, or even religious groups who might like to receive a preference but who could not credibly claim such a preference is constituent with the U.S. Constitution.

Accordingly, the rationale supporting tribal preferences as an initial matter is undermined completely when attempting to expand the preference to a discrete minority group within a larger community and without a Reservation to administer.

II. A Tribal Priority Not Tied to Governance of a Reservation Is Manifestly An Impermissible Race/Ethnic Preference.

Divorced from its initial premise, the Commission cannot adequately distinguish an expanded tribal priority from any other race or ethnic preference that would not survive constitutional challenge.

Over the years, the courts have carved out narrow exceptions in which (a) *Congress* may extend favorable treatment to American Indians (b) where the preference *assists Reservation-residing peoples in governing themselves*.⁷ In this context, it is by no

⁶ *Rural Radio FNPRM* at ¶¶ 7-12.

⁷ *See, e.g., Morton v. Mancari*, 417 U.S. 535 (1974) (staffing the Bureau of Indian Affairs -- now the Indian Health Service); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1994); and *American Federation of Government Employees, AFL-CIO, et al. v. U.S.*, 330 F.3d 513 (DC Cir. 2003) (certain government contracting situations).

means certain that the FCC enjoys authority to expand the tribal preference beyond those with Reservations even if Congress would have such authority. Moreover, there is simply no record to support the notion that American Indian ownership of a radio facility would assist American Indians in governing themselves.

Even if, *arguendo*, the record supported such a determination, this premise would not support extending the preference beyond those living on Reservations. American Indians who do not reside on a Reservation do not govern themselves in a manner substantially different than the methodology employed by any other American who participates in civic organizations and local, state and federal elections. The self-governance rationale is therefore unavailable to the case of non-landed American Indian tribes, rendering expansion of the preference nothing more than a racial preference for which there is no compelling government interest.

A tribal priority would elevate the worthiness of a facility proposed by a tribe of predominantly Catholic American Indians over the worthiness of other Catholics. Without any tie to governance of a reservation, this could produce such an absurd outcome as one tribe of Catholic American Indians winning spectrum rights also sought by a Catholic parish composed of precisely the same members as those that comprise the tribe. It is difficult to discern a rational basis for the agency sanctioning the one applicant over the other.

Radio stations cater to the ethnic communities that exist within their broadcasting area as a natural function of markets. In a coverage area in which one third of the

listening audience is descended from African tribes, one third is descended from American Indian tribes, and a final third is comprised of immigrants from Latin America, the market could be expected to produce stations with programming that serves any distinctive concerns of each of those communities as well as the shared concerns of all potential listeners. There is no valid government interest (much less a compelling one) in preferring the programming of one of those minority populations over the programming of any of the others, and likewise there is no valid (or compelling) government interest in preferring programming aimed at just one of the minorities to the detriment of programming that would be aimed at all of them.

III. The Tribal Priority Amounts to Viewpoint Discrimination and Establishment of Nontraditional Religions.

In addition, a tribal preference for American Indians will hold up the concerns of traditional American Indian religions over those of other religious messages, *i.e.*, those of Catholic broadcasters. This effect constitutes the most problematic type of government preference, that of viewpoint discrimination.⁸ It cannot be reconciled with First Amendment protections afforded to political or religious expression. The problem is exacerbated exponentially as the FCC attempts to expand the preference beyond proximity to a Reservation since, as explained above, the Commission has only tenuously

⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992). Viewpoint Discrimination is almost always invalidated inasmuch as government regulation that government regulation permitting viewpoint discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Id.*, quoting *Simon v. Schuster, Inc. v. N.Y. State Crime Victims Board*, 502 U.S. 105, 116 (1991).

distinguished between the tribal preference and other impermissible racial quotas by citing the comity that the agency can practice with respect to another government.

CRA members support efforts to improve self-governance among American Indians just as we support improved governance of all communities served by Catholic radio stations. We simply do not discern a sustainable rationale to support the preference only in the case of American Indians, and without carrying the “logic” so far as to turn the First Amendment on its head.

After all, if tribal-owned radio stations necessarily improved self governance by American Indians in such a manner as to create a compelling government interest sufficient to overcome constitutional concerns regarding a preference for American Indians, then all proposals for government-owned broadcast stations must similarly be entitled to a preference over all proposals for non-government owned facilities. This would amount to a society in which governments were the preferred source of information and competing ideas about governance. If such a society has been rejected for America at large, why would it be any better at producing a vibrant, well-governed Tribe?

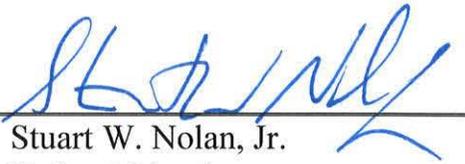
Favoring a particular ethnic group in the awarding of access to the airwaves gets the government into the game of choosing winners and losers in the marketplace of ideas. The federal government’s lack of authority to infringe on political expression, to favor some free associations over others, or to establish a religion cannot be reconciled with the notion that a government agency may move certain ethnic groups to the front of the line when handing out permission to broadcast political and religious ideas.

CONCLUSION

In view of the foregoing, expansion of the Tribal Preference to American Indian tribes who do not govern Reservations is unconstitutional. Accordingly, the Commission should refrain from such a radical step and instead should observe the impact and life expectancy of its existing tribal priority before examining additional steps to foster improved service to the underserved.

Respectfully submitted,

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