



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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MAJOR PENDING CIVIL RIGHTS ISSUES AT THE FCC

April 15, 2004

1. Review of the six 2000 Section 257 Studies, and related constitutional issues, before the issuance of a further NPRM on minority ownership

The Section 257 Studies on market entry barriers (also known as the “Adarand Studies”) were first promised in the Section 257 Inquiry, 11 FCC Rcd 6280, 6305 ¶34 (1996). See also Wireless Report and Order, 12 FCC Rcd 10785, 10878 ¶192 (1997) and Paging Systems Second Report, 12 FCC Rcd 2732, 2809 ¶173 (1997). In the Section 257 First Report to Congress, 12 FCC Rcd 16802 (1997), the Commission emphasized that its research would “assist us in ... determining whether there are constitutionally-sound bases for adopting licensing incentives for women or minorities.” Id. at 16934 ¶23. The following year, the Commission reaffirmed that it was “important to complete these studies and provide for an opportunity for public comment before any ultimate determination of what rules we should have for designated entities.” Competitive Bidding First Report and Order, 13 FCC Rcd 15920, 15994 ¶188 (1998).

Five of the six studies were released at a Public Forum on December 12, 2000. The accompanying Staff Report explained that the studies “explore a series of research questions posed by this strict scrutiny standard. They have been designed to examine both the diversity rationale and the remedial rationale and to evaluate whether the evidence supports them. No single study was designed to provide the definitive answer to this question. Rather, the studies should be evaluated together, along with other studies conducted in the field, to determine whether a compelling interest exists.” Id. at 4.

Soon thereafter, the Commission promised to review the studies. Television Duopolies (Second Order on Reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (“[w]hile we are concerned about minority ownership, we believe ... initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission” (emphasis supplied)).

The studies were not mentioned in the Radio Ownership NPRM, 16 FCC Rcd 19861 (2001). In the Broadcast Ownership NPRM, 17 FCC Rcd 18503, 18521 ¶50 (2002), the Commission acknowledged that it “has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses” but it did not seek public comment on the studies (although it did seek public comment on twelve other studies). The Media Bureau twice failed to consider motions by MMTC and NABOB to seek public comment on the studies. Order, DA 02-2989 (MB, November 5, 2002) at 2 n. 6; Order, DA 02-3575 (MB, December 23, 2002) at 3 n. 12.

Finally, in a footnote, the Broadcast Ownership Report and Order mentioned the existence of the studies without providing or discussing their findings, adding that “we believe additional evidence is necessary, however, before we reach conclusions” on market entry barriers facing minorities, women and small business. 18 FCC Rcd 13610, 13635 n. 70 (2003). The Broadcast Ownership Report and Order did not specify what “additional evidence” is needed.

Finally, the Section 257 Third Report to Congress, FCC 03-335 (February 12, 2004) contained no mention of the Section 257 Studies.

The Commission may adopt race conscious initiatives if they satisfy strict scrutiny and are narrowly tailored. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) and Grutter v. Bollinger, 123 S.Ct. 2325 (2003). Proceedings in the Commission’s Advisory Committee on Diversity in the Digital Age appear to suggest that any serious, effective approach to minority ownership in media and telecom ultimately will require race-conscious initiatives.

Consequently, we encourage the Commission to issue a report (perhaps as a supplement to the Section 257 Third Report to Congress) that analyzes the Section 257 Studies in light of Adarand and Grutter. This report would be a useful predicate to the minority broadcast ownership rulemaking the Commission has said it will undertake. See Broadcast Ownership Report and Order, 18 FCC Rcd at 13636 ¶50.

2. Monitoring and Enforcement of FCC EEO Regulations

No one seriously believes that media and telecom are the only industries in America in which discrimination is absent. Indeed, in 2002, a landmark Ford Foundation study, The Realities of Intentional Job Discrimination in America - 1999, by leading scholars Albert and (the late) Ruth Blumrosen, examined EEO-1 annual employment data using the standard Supreme Court-approved statistical test for inferring intentional discrimination. The study found that 15% of broadcasters discriminate intentionally against women, 20% against African Americans and 24% against Hispanics. The Blumrosens study also found that 30% of telephone companies discriminate intentionally against women, 32% discriminate intentionally against African Americans, and 25% discriminate intentionally against Hispanics. Even if the Blumrosens’ statistics were off by a factor of ten, the extent of discrimination in FCC-licensed facilities is so vast that hundreds of regulates actually should not be holding their FCC licenses. See, e.g., Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629-30 (D.C. Cir. 1978).

Regulation and rule enforcement have deep consequences for racial diversity in the media. For example, MMTC found that after the FCC’s EEO rules were suspended because of an appeals court case in 2001, 42% of broadcast job postings on state broadcast association job sites actually omitted the formerly ubiquitous three-letter “EOE” (equal opportunity employer) tag. This astonishing finding underscores what every civil rights lawyer well knows: without enforcement, old habits of race and gender exclusion tend to re-infect the workplace.

The return of race and gender exclusion is clearly evident in broadcasting. Minority participation in radio and television news has dropped very dramatically. In particular, the 2003 Radio/Television News Directors Association (RTNDA)/Ball State University Annual Survey, which tracks minority participation in broadcasting, yielded these findings [n/a is “not available”]:

<u>Job Category</u>	<u>% Minority (1994)</u>	<u>% Minority (2001)</u>	<u>% Minority (2002)</u>	<u>% Minority (2003)</u>
Total TV News Workforce	17.1%	24.6%	20.6%	18.1%
Total Radio News Workforce	14.7%	10.7%	8.0%	6.5%
TV News Directors	7.9%	8.0%	9.2%	6.6%
Radio News Directors	8.6%	4.4%	5.1%	5.0%
TV General Managers	n/a	8.7%	5.2%	3.6%
Radio General Managers	n/a	5.7%	3.8%	2.5%

See Bob Papper, “Women & Minorities: One Step Forward and Two Steps Back, The Communicator (RTNDA, July/August, 2003), pp. 20-25. RTNDA attributes the dramatic decline of minority participation in radio to “the elimination of the EEO rules.” Id., p. 21.

Notwithstanding the obvious need for baseline EEO data in order to develop policies in this area and monitor their effectiveness, the Commission has proposed to do away with the nation’s only complete, publicly available longitudinal database of common carrier EEO statistics and of discrimination complaints, which it developed in 1976. Wireline Biennial Review NPRM, FCC 03-337 (January 12, 2004), pp. 2-4 ¶¶4-6. This NPRM asked “whether Commission action to modify or eliminate form 395 is appropriate given the efforts of the Advisory Committee on Diversity for Communications in the Digital Age. Specifically, we seek comment on whether this information is useful to the Advisory Committee.” Unfortunately, as in two other recent instances involving core civil rights policies, the Diversity Committee was not afforded an opportunity to review this proposal before it was issued.

The Commission’s proposal to eliminate EEO reporting is based on the premise that EEO data of this type is available elsewhere. That is simply not true. The EEOC does not make individual company EEO reports publicly available, and it only collects reports on employers with 100+ employees. The Commission reports all data publicly and its threshold is 16+ employees. Thus, the Commission should either withdraw this proposal or, at least, hold it in abeyance until the Diversity Committee has had an opportunity to review it.

The radio broadcast license renewal cycle began in October, 2003, and licenses have expired in Maryland, D.C., Virginia, West Virginia, North Carolina, South Carolina, Georgia and Florida, Puerto Rico and the Virgin Islands. The Commission should release a full report on the EEO audits it has conducted on broadcast EEO programs, and it should admonish or prosecute violators of its new broadcast EEO regulations.

3. Restoration of the Tax Certificate Policy

The Tax Certificate policy, adopted in 1978, was responsible for 2/3 of minority owned broadcast stations in existence by 1995, when the policy was repealed. The policy would be partially restored through legislation introduced by Senator McCain and Congressman Rangel. However, it appears unlikely that either bill will receive a hearing or a floor vote this year. Instead, these interim objectives may be achievable:

- (1) securing a “colloquy” on this subject in the Senate
- (2) harmonizing the House and Senate versions so as to facilitate passage; and
- (3) securing White House endorsement of the legislation.

4. Radio Engineering Deregulation: Closing the “Minority Technology Gap”

A complement to broadcast structural ownership deregulation is the full utilization of the spectrum, including the elimination of regulations that are outdated due to improved receiver technology. A positive step toward closing the “Minority Technology Gap” was the Chairman’s decision to lift its nearly four-year old freeze on the filing of applications for major modifications of AM stations and for construction of new AM stations. “FCC Chairman Michael Powell Announces Opening of Application Window for AM Radio Service: Powell Highlights Strengthening of Minority-Owned AM Stations,” FCC News Release, November 6, 2003.

According to Mullaney Engineering, 1,291 applications were filed during the window, including 201 applications for major mods of license or major mods of construction permits, as well as 1,090 applications for new stations. The number of applications far exceeded our predictions, and underscore the high demand for entry into broadcasting.

Here are some statistics illustrating the depth of the Minority Technology Gap in radio:

- In 2001, there were 13,018 radio stations, of which 548 (4.2%) were minority owned and 12,469 (95.8%) were nonminority owned. The asset value of minority owned commercial radio stations is now approximately 1.3% of the total asset value of all commercial radio stations. This means that the typical minority owned station is worth only about 30% of the value of the typical nonminority owned station.
- Of the 4,781 AM stations in 2001, 283 (5.9%) were minority owned and 4,498 (94.1%) were nonminority owned.
- Of the 8,236 FM stations in 2001, 265 (3.2%) were minority owned and 7,971 (96.8%) were nonminority owned.
- Of the 548 minority owned stations in 2001, 283 (51.6%) are AM stations; of the 12,469 nonminority owned stations, 4,498 (36.1%) were AM stations. Thus, a minority owned station was 43% more likely than a nonminority owned station to be an AM station.
- Minorities own none of the 25 unduplicated AM “clears.” Those licenses were typically given out in the 1920s, a generation before minorities owned any radio stations.

- Of the 283 minority owned AM stations in 2001, 23 (8.1%) operated between 540-800 kHz. Of the 4,498 nonminority owned AM stations, 569 (12.7%) operated between 540-800 kHz. Thus, minorities were 36% less likely than nonminorities to own these low-band facilities. This means, also, that only 3.9% of the low-band AM stations were minority owned.
- Of the 283 minority owned AM stations in 2001, 96 (33.9%) operated between 1410-1600 kHz. Of the 4,498 nonminority owned AM stations, 1,277 (28.4%) operated between 1410-1600 kHz. Thus, minorities were 19% more likely than nonminorities to own these high-band facilities.
- Of the 265 minority owned FM stations in 2001, 20 (7.5%) were full Class C's. Of the 7,971 nonminority owned FM stations, 895 (11.2%) were full Class C's. Thus, minorities were 33% less likely than nonminorities to own these most powerful FM stations in the country. This means, also, that only 2.2% of the full Class C's were minority owned.
- Of the 265 minority owned FM stations in 2001, 128 (48.3%) were Class A's. Of the 7,971 nonminority owned FM stations, 3,185 (40.0%) were Class A's. Thus, minorities were 22% more likely than nonminorities to own these lower power facilities.
- Of the 87 minority owned, top-50 market FM in 2003, 21 (24.1%) were licensed to the dominant community in the market. Of the 897 nonminority owned FM stations in the top 50 markets, 343 (38.2%) were licensed to the dominant community in the market. Thus, minority owned stations were 37% less likely to be licensed to the dominant community in the market as were the nonminority owned stations in the same markets.

In light of the severity of the Minority Technology Gap, the Commission should examine whether to relax or repeal regulations that inhibit new minority ownership or prolong minority owners' inferior technical status. Examples of deregulatory and spectrum-efficiency initiatives that would generally benefit minority media owners might include these proposals that we have offered to the Diversity Committee's New Technology Subcommittee:

1. create medium powered FM stations (e.g. 1000 watts at 50 meters)
2. create medium powered AM stations in the expanded band (per petition for rulemaking already on file from a private engineer)
3. authorize the systematic development of FM through interference-based criteria
4. conduct a channel search for new FM opportunities, rather than relying on hit-or-miss rulemaking petitions to revise the FM Table
5. conform interference protection standards for B and B-1 FMs to those applicable to C2 and C3 stations
6. relax the third-adjacent FM contour standard in light of the Mitre study

7. relax the community of license and transmitter site rules to allow suburban facilities to move closer to their audiences
8. allow interference agreements between licensees, or for a licensee with itself
9. place a limit on the number and location of radio translators a company may own
10. substantially relax the local studio staffing rules
11. increase the bidding credits for auctions
12. require same-day updates of entitlements to bidding credits, to reduce fraud.

5. Access to Free Television by Low-Income Families

In the DTV Proceeding, MMTC, joined by 24 other national organizations, proposed a DTV transition voucher program similar in many respects to what has become known as the “Berlin Model.” DTV, especially multi-channel DTV, is being created in large measure as a means of assuring that television will more effectively respond to the unmet needs of low income and particularly minority consumers. Thus, a voucher program to enable low-income consumers to purchase DTV receiver equipment would make these consumers “early adopters” and accelerate the DTV transition by hastening achievement of the Congressional 85% coverage threshold. See Comments of Civil Rights Organizations in MB Docket 03-15, (filed April 21, 2003), pp. 17-26.

Recent press reports suggest that the Commission may recommend to Congress a definition of digital coverage that treats a household as receiving digital TV even if it actually receives only a single analog signal that has been down-converted from digital to analog by a cable system. See Bill McConnell, “Millions could be without TV,” Broadcasting & Cable, March 15, 2004, p. 5. Sinclair Broadcast Group’s VP of New Technology, Nat Ostroff, states accurately that “[t]his was not the understanding under which billions of dollars have been invested in HD delivery systems and transmission.” Id.

The concept of treating single-channel analog reception as though it is multi-channel digital would frustrate the achievement of multi-channel DTV, much of which is likely to be multicultural and minority-oriented. A digital transition triggered by second-class service to the poor would inevitably lead us to a two-tier system of television, under which wealthy people receive the full fruits of digital TV and the poor receive inferior service or no service at all. Further, a DTV transition program without vouchers would shut low-income families out of the television universe entirely.

Rapid clearing of the 700 MHz band would provide substantial benefits to all Americans, especially if unlicensed and pay services are each permitted to share the band harmoniously. On the other hand, band clearing must not be undertaken on the backs of the poor. For 50 years, television has been the nation’s common public sphere, uniting all races and social classes with a generally common set of programming choices and opportunities. Before recommending to Congress that it undermine this most basic premise of American broadcast regulation, the Commission should solicit and receive the advice of its Advisory Committee on Diversity.