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STATEMENT OF POLICY ON MINORITY OWNERSHIP OF BROADCASTING FACILITIES

One decade ago, as a partial response to the concerns expressed in the Report of the National Advisory Committee on Civil Disorders ("The Kerner Report"),¹ the Commission articulated policies and principles which would guide it in its consideration of complaints that its licensees - or those who would be its licensees - had discriminated against minorities in their employment practices.² We observed that "we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination - of violating the National Policy."³

One year later, July 16, 1969, the Commission adopted rules which, in addition to forbidding discrimination on the basis of race, color, religion or national origin, also required that "equal opportunity in employment...be afforded by all licensees or permittees...to all qualified persons."⁴ To meet this goal, licensees were required to develop a program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice. On May 20, 1970, the Commission adopted

1 Report of the National Advisory Commission on Civil Disorders, (New York: Bantam Books, 1968).

2 Petition for Rulemaking to Request Licensees to Show Nondiscrimination in their Employment Practices, 13 FCC 2d 766 (1968). ("(A) petition or complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it.")

3 Id. at 769.

4 Nondiscrimination Employment Practices of Broadcast Licensees, 13 FCC 2d 240 (1969). "Sex" was added as an impermissible basis for discrimination in May, 1970. Nondiscrimination Employment Practices of Broadcast Licensees, 23 FCC 2d 430 (1970).

rules requiring most of the licensees within its jurisdiction to file annual employment reports and a written equal employment opportunity program with certain application forms.

Just two years ago, we reiterated and clarified our policy on employment discrimination. We emphasized that our rules embodied the concepts of nondiscrimination and affirmative action, observing that:

"An Affirmative Action Plan is a set of specific and result oriented procedures which broadcasters must follow to assure that minorities and women are given equal and full consideration for job opportunities." ⁵

In adopting the Model EEO Program proposed in 1975, the Commission noted that:

"As we have moved with steadily increasing actions to strengthen our rules and policies in the area of nondiscrimination in the employment policies and practices of broadcast station licensees, we have attempted to do so in line with our primary statutory mandate--the regulation of communication by wire and radio in the public interest....

[W]e have sought to limit our role to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service broadcasting." ⁶

The Supreme Court has spoken favorably of such Commission actions. In NAACP v. FCC, 425 US 662, 670 n. 7 (1976), the Court observed:

"The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees.... These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934....to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."

The Commission has taken action on other fronts as well to assure that the needs, interests and problems of a licensee's community (including minorities within that community) are both ascertained and treated in the programming of the licensee. Under our ascertainment requirements ⁷

5 Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354, 358 (1975).

6 Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226, 229-230 (1976).

7 Ascertainment of Community Problems by Broadcast Applicants, 57 FCC 2d 418 (1976).

licensees are required to contact community leaders and members of the general public to obtain information about community interests and to present programming responsive to those interests. To aid licensees in these efforts, we have developed a community leader checklist consisting of 20 groupings or institutions which we believe are found in most communities. Reflecting our commitment to the expression of minority viewpoints, we have required that licensees specifically contact minorities in a community as a distinct grouping or institution (among the 20 groupings outlined by the Commission) from which representative leaders are to be drawn. Moreover, the Commission requires that the licensee interview minorities and women within the 19 "non-minority" institutions or groupings which it also expects the licensee to contact as part of its ascertainment procedure.

While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities⁸ continue to be inadequately represented in the broadcast media.⁹ This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

As the Commission's Minority Ownership Task Force Report recounts:

"Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than one percent of the 8,500 commercial radio and television stations currently operating in this country. Acute underrepresentation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial

8 For purposes of this statement, minorities include those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.

9 See Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report (1978); U.S. Commission on Civil Rights, Window Dressing on the Set (1977); see also The Kerner Report, supra, at 207, 208, 210.

proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities. 10

It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because "diversification...is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." 11 What is more, affecting programming by means of increased minority ownership--as is also the case both with respect to our equal employment opportunity and ascertainment policies--avoids direct government intrusion into programming decisions.

Hence, the present lack of minority representation in the ownership of broadcast properties is a concern to us. We believe that diversification in the areas of programming and ownership--legitimate public interest objectives of this Commission--can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

The United States Court of Appeals for the District of Columbia observed in Citizens Communications Center v. FCC, 447 F. 2d 1201 (D.C. Cir. 1971):

"Since one very significant aspect of the 'public interest, convenience, and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it."

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"As new interest groups and hitherto silent minorities emerge in our society, they should be given the same stake in the chance to broadcast on our radio and television frequencies." 12

10 Minority Ownership Report, supra.

11 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965).

12 447 F. 2d at 1213 n. 36.

In TV 9 Inc. v. FCC, 495 F. 2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974), the Court again dealt with the issue of minority ownership. In reversing a decision where the Commission had refused to award merit to an applicant in a comparative proceeding based upon minority ownership and participation the Court emphasized:

"It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media entrepreneurship...."

"We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded."

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"The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news." 13

The Court made plain that minority ownership and participation in station management is in the public interest both because it would inevitably increase the diversification of control of the media and because it could be expected to increase the diversity of program content. 14

The Commission has acted in accordance with these judicial expressions. Its Administrative Law Judges have afforded comparative merit to applicants for construction permits where minority owners were to participate in the operation of the station. 15 The Commission itself has ordered the expedited processing of several applications filed by applicants with

13 495 F. 2d at 937-38 (emphasis added).

14 As the Court observed in a subsequent opinion: "The entire thrust of TV 9 is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that reasonable expectation without 'advance demonstration' gives them relevance." Garrett v. FCC, 168 U.S. App. D.C. 266, 273, 513 F. 2d 1056, 1063 (1975), 1056, 1063 (D.C. Cir. 1975) (footnote omitted).

15 Berryville Broadcasting Co., Docket 21185, FCC 78D-16 (1978); Roseman Broadcasting Co., Inc., Docket Nos. 19887-8, 54 FCC 2d 394 (1976); Robert M. Zitter and Hillary E. Zitter, Docket 20243, FCC 75D-43 (1975).

significant minority ownership interests. 16

Nevertheless, the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action. 17 Accordingly, in issuing this statement of policy, we today endorse our commitment to increasing significantly minority ownership of broadcast facilities.

To implement our policy we initiate the first of several steps we expect to consider in fostering the growth of minority ownership.

In conjunction with our customary examination of assignment and transfer applications, 18 we intend to examine such applications where a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased. In such circumstances, we will make use of our authority to grant tax certificates 19 to the assignors or transferors where we find it appropriate to advance our policy of increasing minority ownership. 20 A similar proposal was advanced to us by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General

16 Atlass Communications, Inc. (WJPC), 61 FCC 2d 995 (1976); Hagadone Capital Corporation, FCC 78-123, 42 P&F Radio Reg. 2d 632 (1978); Letter to Messrs. L. Glaser and Francis E. Fletcher, Jr., FCC 78-167, adopted February 22, 1978; Letter to Ken Goodman, FCC 78-279, adopted April 20, 1978; Letter to Terry E. Tyler, FCC 78-280, adopted April 20, 1978.

17 For a general treatment of the growth of Black-owned radio, see Bachman, Dynamics of Black Radio, (1977).

18 See Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 310(b).

19 Under 26 U.S.C.A. Section 1071, the Commission can permit sellers of broadcast properties to defer capital gains taxation on a sale whenever it is deemed "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations...." Originally tax certification was used to remove the hardship of involuntary transfer as a result of divestiture imposed by the Commission's multiple ownership rules. Now, however, tax certificates are routinely approved in voluntary sales as an incentive to licensees to divest themselves of communications properties grandfathered under the multiple ownership rules. Issuance of Tax Certificates, 19 P&F Radio Reg. 2d 1831 (1970).

20 We currently contemplate issuing a certificate where minority ownership is in excess of 50% or controlling. Whether certificates would be granted in other cases will depend on whether minority involvement is significant enough to justify the certificate in light of the purpose of the policy announced herein.

Electric Broadcasting Company and the National Black Media Coalition.

Moreover, in order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price ²¹ to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

While we normally permit distress sales when the licensee is either bankrupt or physically or mentally disabled, there is precedent for such sales based on other grounds. See, e.g., Radio San Juan, 29 P&F Radio Reg. 2d 607 (1974). The avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrent to wrongdoing. We contemplate grants of distress sales in circumstances similar to those now obtaining except that the minority ownership interests in the prospective purchaser will be a significant factor. The parties involved in each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy. All such transactions will be scrutinized closely to avoid abuses.

The Congressional Black Caucus has petitioned for rulemaking to permit distress sales to minorities. While we endorse the goal of such a proposal we have concluded that cases should be reviewed as they arise to determine that the objectives of our policies will be met. Consequently, for the present a rigid rule on such sales will not be adopted.

Applications by parties seeking relief under our tax certificate and distress sale policies can be expected to receive expeditious processing.

We are keenly aware that the first steps we announce today do not approach a total solution to the acute underrepresentation problem. They are made possible because proposals raising these issues have been submitted to us and these proposals, the collective comments received thereon, and the findings of our Minority Ownership Task Force provide us with a compelling record upon which to base our action.

Beyond the steps taken today, we intend to examine, among other things, the recommendations set forth in the Minority Ownership Report. Also, while the immediate area of concern of this statement has been broadcasting, it is expected that in the future attention will also be directed towards improving minority participation in such services as cable television and

²¹ In order to provide incentive for broadcasters opting for this approach, we would expect that the distress price would be somewhat greater than the value of the unlicensed equipment, which could be realized even in the event of revocation. See Second Thursday Corporation, 22 FCC 2d 515 (1970), recon. granted 25 FCC 2d 112 (1970); Northwestern Broadcasting Corporation (WLTH), 65 FCC 2d 66 (1977).

common carrier. Finally, as was concluded in our Minority Ownership Report, if the goal of significant minority ownership is to be reached, Congress, other governmental agencies, and the private sector must join in these efforts. We welcome petitions for rulemaking or other submissions from concerned parties as to other actions we might take to reach our objectives. 22

Action by the Commission May 17, 1978. Commissioners Ferris (Chairman), Lee, Quello, Washburn, Fogarty, White and Brown.

22 For example, while today's actions are limited to minority ownership because of the weight of the evidence on this issue, other clearly definable groups, such as women, may be able to demonstrate that they are eligible for similar treatment.

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