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Supplemental Comments

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HEARING BEFORE THE SENATE COMMERCE COMMITTEE
SUBCOMMITTEE ON COMMUNICATIONS
HELD SEPTEMBER 15, 1989

MINORITY OWNERSHIP OF BROADCAST STATIONS

SUPPLEMENTAL COMMENTS

by Dr. J. Clay Smith Jr., Esquire
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The distress sale policy grew out of a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by Congress in 1934 when the Communications Act was adopted. Under the distress sale policy, the public interest was intended to be served by aiding minority entrance into the marketplace and to ease the burden of the exit of non-minorities by sparing them from the death penalty -- the revocation of their license./*

ON BEHALF OF THE NATIONAL BAR ASSOCIATION 1/

On September 15, 1989, two members of the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Communications held a hearing on Minority Ownership of Broadcast Stations. Senator Daniel K. Inouye, Chairman of the Subcommittee, presided at the hearing; and, Senator Conrad Burns participated. Ten individuals representing minority- and majority-owned broadcast stations, the Federal Communications Commission, scholars, Communications lawyers and women's and minority rights advocates testified about the status of three policies that affect minority ownership of broadcast stations. 2/

*/ Extracted from Oral Statement of Professor J. Clay Smith Jr., before the Senate Commerce Committee, Subcommittee on Communications, September 15, 1989.

1/ All views expressed in this supplemental comment are those of the authors and the National Bar Association. These comments do not express the views of the authors' respective employers.

2/ The following persons testified at the hearing: Marilyn Fife, Ph.D., Assistant Professor, Department of Radio, TV and Film, Temple University, Philadelphia, Pennsylvania; Roy Huhndorf, Chairman, Cook-Inlet Region, Inc., Anchorage, Alaska; William E. footnote cont'd

In the last decade, the Federal Communications Commission (the Commission) implemented three policies to enhance diversity of viewpoint for the broadcast audience and to improve minority applicants' opportunity to acquire broadcast licenses. On May 17, 1978, the Commission declared that a minority enhancement credit would be one of seven factors used in a comparative hearing to determine which of two mutually exclusive applicants would provide the best practicable service to the listening and viewing public. 3/

At the same time, the Commission developed two other policies. The distress sale policy permitted reduced price sales of stations that have been designated for renewal or revocation hearings to minority-owned or minority-controlled purchasers. Tax certificates were also offered to broadcasters who transferred or assigned their stations to potential licensees with significant minority ownership interests. 4/

Kennard, Esquire, Washington, D.C.; Patricia Niekamp, President, American Women in Radio and Television, Washington, D.C.; John Payton, Esquire, Washington, D.C.; Richard Ramirez, President, Astroline Communications, WHCT-TV, Hartford, Connecticut; Alan Shurberg, Shurberg Broadcasting of Hartford, Inc., Hartford, Connecticut; Dr. J. Clay Smith Jr., Professor Law, Howard University School of Law, Washington, D.C.; Percy Sutton, Chairman, Inner City Broadcasting, New York, New York; and, James L. Winston, Esquire, Executive Director and General Counsel, National Association of Black Owned Broadcasters, Washington, D.C.

3/ See Policy Statement on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979, 982 (1978). The Commission's Administrative Law Judges had already commenced granting credit to minority applicants in comparative hearing proceedings because the United States Court of Appeals for the District of Columbia Circuit had mandated it in TV 9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974). The court held that such credit should be given "only when minority ownership is likely to increase diversity of content . . ." 495 F.2d at 938.

Nineteen years after the policy was announced, the United States Court of Appeals for the District of Columbia Circuit concluded that this policy is constitutional. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985) (license to Black woman who received merit for minority ownership upheld).

4/ 68 FCC 2d at 983.

At the hearing on September 15, Senator Inouye announced the focus of the conference: (1) codification of the definition of the term "minority," (2) codification of policies which ensure minority ownership, and (3) expedition of the "slow and tedious" comparative process. Senator Inouye expressed further concern about sham minority licensees who are depriving minorities of benefits the Commission had intended for minorities. Sham operators obtain licenses by misrepresenting their minority interests and/or the status of minority employees at the broadcast station.

Unfortunately, in recent years the Commission has not actively enforced its minority policies. In Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985), and Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 901 (D.C. Cir. 1983), the Commission voluntarily requested a remand of the cases for reevaluation of its minority enhancement policies.

We applaud the Subcommittee for its interest in enacting legislation to codify policies that are so important to the general public. Although the policies have been in effect for over ten years, they are being attacked by the courts and others who do not fully understand the purpose or the true beneficiaries of the policies. This year, the Court of Appeals for the District of Columbia Circuit ruled that distress sales violate the Fifth Amendment because the policy did not remedy past discrimination or promote diversity of programming. 5/ Five years earlier, the same court concluded that "[p]romoting minority ownership, if linked to minority management, is desirable as a way of increasing the overall diversity of prospectives represented in the broadcast mass media." 6/

Other advocates who argue against enforcement of these policies contend that the policies are unduly burdensome on non-minorities since distress sales and tax certificates favor award of licenses to minorities to the exclusion of qualified non-minorities; and, non-minorities lose money on these deals. When the Commission articulated these policies, it certainly did not intend to create financial hardships for non-minorities. In fact, the Commission commented that the licensee who was in danger of

5/ Shurberg Broadcasting of Hartford, Inc. v. FCC, No. 84-1600 (D.C. Cir. Mar. 31, 1989).

6/ West Michigan Broadcasting Co. v. FCC, 735 F.2d 601, 609 (D.C. Cir. 1984).

losing his license would probably receive a higher distress sale price for his license than he would receive for unlicensed equipment. 7/ Hence, the policy advanced a dual benefit to minorities and non-minorities.

Non-minority broadcasters are not obligated or otherwise compelled to engage in distress sales or to seek tax certificates. Tax certificates and distress sales are offered to "encourage broadcasters to seek out minority purchasers," 8/ and to benefit non-minorities in real dollars.

~~Furthermore, the Commission explicitly stated that any~~ minority applicant considered under either of these policies must still meet the Commission's qualifications. 9/ For instance, with respect to the minority enhancement credit, an applicant's minority status is only one of seven factors which the Commission reviews to determine whether an applicant is qualified.

Moreover, large numbers of minorities are not receiving benefits from either of these policies. Only thirty-eight distress sales have been performed since that policy was announced in 1978.

At the end of the hearing on September 15, Senator Inouye announced that for sixty days, he would keep the record open for additional comments from interested parties. Senator Inouye specifically invited supplemental remarks from Professor J. Clay Smith Jr., Professor of Law, Howard University School of Law, and Dr. Marilyn Fife, Assistant Professor, Temple University.

The Commission is the only agency that has access to vital data that would resolve issues regarding diversity of programming and the economic value of these policies to non-minorities as well as the diversity values as relates to minorities. The National Bar Association proposes that the following questions be submitted to the Commission. These questions are derived from an analysis of the comments submitted at the September 15 hearing. The answers will support the reasonableness of the position that non-minorities do in fact benefit from the Commission's minority ownership policies, and more specifically, the distress sale policy.

7/ "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." 68 FCC 2d at 983 n.21 (citations omitted).

8/ Id (emphasis added).

9/ Id.

OWNERSHIP OF STATIONS

1. How many broadcast stations exist in the United States? Please specify type (i.e., radio, television).
 2. How many broadcast stations have minorities in management or other policy decision-making positions?
 3. How many broadcast stations are owned by minorities? For each minority owner, please state:
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- (a) the ethnic background of the owners;
- (b) date original license was issued;
- (c) city and state where station is located.

4. How many of the minority owned or minority-controlled broadcast stations were purchased after May 1978?
5. How many and what percentage of the total applicants involved in comparative hearings requested and were granted an enhancement credit for minority participation?

DISTRESS SALES

1. What was the purchase price of each of the thirty-eight broadcast stations that have been sold since 1978 pursuant to the distress sale policy? What was the fair market value of each of these stations?
2. Describe the regularity of the use of the Minority Buyers' List by sellers of broadcast stations.
5. Does the Commission continue to refer to the Minority Buyers' Listing when broadcast stations are sold? If so, what procedure does the Commission follow to utilize this information?
6. How are potential minority purchasers notified that the Minority Buyers' List exists?
7. How many potential minority buyers are on the current list?
8. How often is the list of potential minority purchasers updated?

TAX CERTIFICATES

1. How many tax certificates have been issued to assignors or transferrers for sales to purchasers with significant minority interests? For each certificate issued, please state:

- (a) the date of each certificate;
- (b) the ethnic origin of each minority purchaser;
- (c) the value of the financial benefit to the seller.

~~2. How many times has the Commission denied a certificate to a seller when the proposed minority purchaser did not meet Commission qualifications?~~

SHAM OPERATIONS

1. Describe how often the Commission has discovered that an applicant has incorrectly stated its minority interests?

2. What are the circumstances of these sham operations? (i.e., no minority owners, no minority management, employees are employed solely for the purpose of obtaining a license and they are discharged within a short time after the applicant is licensed)

3. What policies has the Commission promulgated to avoid licensing sham operations? Discuss in detail.

4. Has the Commission taken actions to discipline licensees and applicants who have misrepresented their minority ownership interests?

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