

THE ACCESS DIVIDE: THE ROLE OF THE FCC AND THE COURTS IN MINORITY OWNERSHIP

By Angela Winters*

On December 18, 2007¹, the Federal Communications Commission voted in favor of repealing a 32-year old rule that prohibited broadcasters in the twenty largest media markets from owning newspapers in the same market. This vote was the culmination of an eighteen-month review of the agency's media ownership rules, which included a series of public meetings across the country and feedback from thousands of individuals and groups on the issue.²

Depending on who you talk to, December 18th was either one of the worst days for minority ownership in the industry for advocates of women and minority-owned businesses, or one of the best days for advocates of consolidation and increased competition. The vote was 3-2, drawn across partisan lines, with opposing Democrat commissioners Michael Copps and Jonathan Adelstein expressing disappointment with the decision and warning of its consequences. The majority, supported by Republican Chairman Kevin Martin, Deborah Taylor Tate and Robert McDowell, felt that the ruling was both well overdue and in line with Congressional recommendations to review rules considering the changes in technology and the market. This close ruling will almost certainly be challenged in court.

The original proposal had prompted strong opposition from civil rights organizations, minority professional media associations, many individuals in Congress, and those within the industry. Each group expressed a highly visible and vocal objection to the ruling, believing it harmful to existing and prospective women and minority owners. These objectors also believed that the ruling should have been delayed until an independent diversity task force had conducted more research and made final recommendations.

In response to the criticism, Chairman Martin rejected the notion that the rules adopted on December 18th would favor big business before women and minority-owned businesses, and stated that these rules were specifically intended to further the goals of competition, diversity, and localism, all crucial factors in the future of an industry in transition.³ Several separate measures were also adopted by the commission on December 18th in order to punish discrimination in broadcast transactions, and to promote minority participation in the industry, with particular attention to the transition to digital broadcasting.⁴ While some civil rights organizations applaud these steps as separate from the cross-ownership ruling, others say these measures were reached "without adequate data and any thorough study of the issue."⁵ Certain organizations also believe that the agency should have addressed these measures fully before pursuing wider reform of

the cross-ownership rules.⁶

Both of the decisions made on December 18th mark the latest chapters in a contentious relationship between the FCC and civil rights organizations over the agency's record of promoting minority ownership. While the FCC has played a role in several advances for minorities, with occasional interference by the courts, this relationship is mostly marred by setbacks, which some view as a major cause of the media-diversity crisis existing today.

This article analyzes these issues, and demonstrates the FCC's trend toward disregarding discrimination and denying access to minorities in ownership. The article will also comment on the responsibilities that come with ownership for non-minority owners. Though civil rights organizations and the FCC need each other in order to be successful, recent decisions have decreased the level of trust in each other, while also birthing a new strategy in civic action that gives those in opposition to the agency's proposals and decisions more power than ever. There have been small steps towards progress, including the ruling on December 18th to punish discrimination in broadcasting. However, it seems that for every small advancement, the FCC also takes a step back. In light of the resulting deadlock, a solution to this conflict is more crucial now than ever. The changing face of the market, as well as new technology, means the telecommunications and media industry has to deal with the reality of consolidation while also catering to the needs of emerging markets and fulfilling its obligation to society.

THE NUMBERS

The current state of diversity in the media and telecommunications industries, which make up about 1/6 of the U.S. economy, is grim.⁷ Minorities, who constitute 34% of the American population, own less than 10% of the media outlets, a percentage that has steadily decreased since 1998.⁸ While some see the FCC data on its advancement of minority groups as contradictory, incomplete, or arrived at through flawed methodology, the data does demonstrate a stark difference between population demographics and media ownership. Non-Hispanic white males control 76.6% of all stations, leaving women, who represent 51% of the U.S. population, with 4.97% of all stations; Latino Americans, who represent 14% of the U.S. population, control 3.26% of all stations; African Americans, who represent 13% of the U.S. population, control 1.3% of all stations; and Asian Americans, who represent 4% of the U.S. population, control 0.44% of all stations.⁹ The vast majority of minority-owned stations are techni-

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cally inferior AM stations or low-powered FM stations and most are licensed to towns far from central cities.¹⁰ Only four of the 400-plus cable channels available in the U.S. are minority-controlled (TV One, The Black Family Channel, SiTV and The Africa Channel). The Black Entertainment Channel was sold to Viacom in 2000.¹¹ Minority ownership in the telecom sector, including wireless, is negligible, with a few small companies holding licenses in a handful of rural communities.¹² Of the 100 most-visited U.S. websites, none are owned by minorities.¹³

This issue goes beyond just fairness for women and minority owners. Advocates for civil rights issues in the telecom industry are actively urging the FCC to take immediate, determinative steps to reverse these numbers because of the powerful role this particular industry plays in society. Media and telecommunications are the primary definers of both our culture in America and the world at large. Regarding the need for a diversity task force, Rev. Jesse Jackson, Sr., founder of the Rainbow/PUSH Coalition, said that the lack of minority owners leads to minorities being depicted in the media as “less intelligent than we are, less hard working than we are, less patriotic than we are and more violent.”¹⁴ According to Jackson, ownership is central to civil rights issues because control of the media translates into control of the issues on the nation’s social agenda.¹⁵

THE BAD HISTORY

Vocal opponents of the FCC’s latest ruling see it as more of the same discrimination and exclusion that they have been fighting for decades. “In our attempts to kick the doors in, we’ve submitted countless proposals, most of which the FCC has rejected, ignored existed or placed on eternal hold,” said David Honig,¹⁶ Executive Director of the Minority Media & Telecommunications Council, which represents more than fifty organizations before the FCC. Honig added that case history and administrative actions show that while the FCC is supposed to remove market entry barriers for smaller businesses, it has instead been the primary obstacle for minority owners and interests.¹⁷

In the 1950s, the FCC renewed the construction license of Southland Television,¹⁸ a segregationist owned station. The FCC gave full faith and credit to a Louisiana segregation law that was in direct contradiction to the Telecommunications Act of 1934, which prohibited regulation in communication by wire and radio from discriminating on the basis of race.¹⁹

In *Lamar Life*,²⁰ a case decided during the turbulent civil rights movement, the FCC renewed the license of WLBT in Jackson, Mississippi to a White Citizens Council Leader. This Council Leader urged re-segregation and deliberately cut off programming when the NAACP was expected to appear. The ruling was quickly reversed when the United Church of Christ asked the D.C. Circuit Court to intervene based on WLBT’s refusal to fulfill its obligation to serve the general public interest, including the sharing of opposing views in favor of integration.

²¹ The court later ordered the FCC to deny the renewal of the license and noted that a “curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct.”²²

In 1965, the FCC further reversed minority owner’s progress when it established what became known as the Ultravision Rule. This rule required that in order to qualify for a permit, an applicant must have enough funds to cover all costs and a full year of operating capital.²³ Although this rule did not consider race or gender, the standard, which lasted until 1981, made it almost impossible for anyone other than the very wealthy to get a license. During that time, the qualifying group was almost exclusively made up of white male owners.

In 1973, the National Black Media Coalition submitted sixty-one minority ownership and EEO proposals to the FCC, who rejected all of them.²⁴ In 1983, the agency refused to hold a hearing on WAVY-TV in Norfolk, Virginia despite allegations owners did not invite black employees to the station Christmas party because they wanted to hold it at a segregated country club.²⁵

In the 1990s, the FCC and the courts continued to disappoint civil rights groups with a seeming inability to enforce minority and local ownership policies in comparative hearings,

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despite existing evidence of abuses by license owners.²⁶ The FCC had to get rid of most of its diversity-focused initiatives when the *Adarand v. Peña* ruling in 1995 heightened the standard of scrutiny for federal race-conscious programs from intermediate to strict scrutiny.²⁷ Strict scrutiny requires the showing of a compelling government interest in order to consider race in forming ownership policies.²⁸

Changes in the Administration create obstacles for advancement, and investigations vary depending on the political priorities of the current president and the person he or she appoints to head the commission. Civil rights groups were pleased with the 1999 National Telecommunications & Information Administration’s (“NTIA”) study showing several factors that lead to what it termed “the digital divide,” including consolidations that adversely impact minority ownership.²⁹ However, after a new administration came to power in 2001, NTIA concluded their study by stating that there was no real race or class division in internet access, and also stopped publishing its minority ownership report.³⁰

The FCC has faced internal conflict in relation to diversity, as evidenced by the December 18th hearing, in which some commissioners rejected or ignored the attempts of other commissioners to support diversity. In 2000, FCC Chairman William Kennard released five studies on minority ownership with the intention of building a legal framework to help restore previously successful policies that had been repealed or neglected.³¹ The

Commission has yet to publicly mention evaluating these studies.

THE GOOD HISTORY

Despite the aforementioned setbacks, the FCC has been somewhat involved in minority advancements. The FCC, Congress, and the courts have all played a role in advancing the interests of women and minority owners through administrative acts, sparse case history, and incentive-based regulation. In the 1940s, the FCC created the Fairness Doctrine based on authority in §315 of the Telecommunications Act of 1934.³² In the 1970s, the D.C. Circuit Court ruled that minority ownership should be a factor in broadcast licensing,³³ and must be a factor in the FCC's administration of its spectrum management policies.³⁴

In 1974, FCC Chairman Richard Wiley convened the first Minority Ownership Task Force, which resulted in the tax certificate and distress sale policies.³⁵ Both policies were applauded by civil rights and professional minority groups. The FCC's various incentive-based regulations are probably the only areas in which the agency, civil rights groups, and the industry can agree. A few policies are worth noting.

The Comparative Hearing Policy was created in 1973 when the D.C. Circuit held that it must consider minority ownership as a comparative factor in choosing among mutually exclusive applicants for new construction permits.³⁶ The Tax Certificate Policy was adopted in 1978 and permitted a company selling a broadcast or cable property to minorities to defer the capital gains taxes on the sale if the seller reinvested in comparable property.³⁷ This led to more than 200 minority-owned stations.³⁸ The Distress Sale Policy, established in 1978, allows a seller in danger of losing his license to sell his station to a minority-owned company for 75% of market value or less, and thereby avoid paying a hefty penalty.³⁹ This policy has resulted in more than fifty stations being sold to minorities, and is the only such policy still in place today.⁴⁰

DRASTIC CHANGES OF THE 1990S

There is no doubt that the 1990s changed the landscape for many existing and prospective minority owners in the industry. The Telecommunications Act of 1996 created several amendments and caused dramatic changes intended to support diversity in ownership. Gender was added to the list of prohibited discriminations in § 151 of the Telecommunications Act, and § 257 now requires triennial reports on efforts to eliminate market entry barriers for small, minority, & female-owned businesses.⁴¹ Probably the most important change was to end the comparative hearing process by deciding that all wireless licenses would be issued through auctions.⁴² The FCC used this "designated entity" structure to provide bidding advantages to small and minority-owned businesses.⁴³ And while the creation of the Telecom-

munications Development Fund could have been a significant source of funding for minority broadcast and telecommunications entrepreneurs, it was terminated in 2005.

In 1996, William Kennard became the first minority to chair the FCC. His focus seemed to be primarily in wireless communications and hoped to close the digital divide in access to the internet. He also actively encouraged new owners to spin off stations to minority owners during a heavy consolidation period. He challenged broadcasters to open new doors to women, and helped push for the creation of the Quetzal/Chase Communications Partners LP Fund with \$175 million in beginning funds.⁴⁴

When authorizing the creation of television "duopolies" in 1999, the FCC took steps to protect minority ownership by adopting the "Failing Station Solicitation Rules," which requires any applicant for a duopoly to show that "active and serious efforts" were made to either sell the station or allow for buyers outside the market.⁴⁵ In 1998, The Rainbow/PUSH Coalition created the Media & Telecommunications Project to monitor industry legislation regarding minorities, and it now holds a yearly symposium attended by industry leaders, FCC Commissioners and investors interested in minority and women owners.

In 2003, the FCC established the Advisory Committee on Diversity for Communications in the Digital Age, with twenty-nine experts from the industry. Since their last meeting in December 2004, the committee has been deprived of staff and denied the ability to hold meetings.⁴⁶ 2003 was also the year the FCC first voted 3-2 to deregulate broadcast ownership rules, thereby allowing a single company to own up to one newspaper,

three TV stations and eight radio stations in the biggest markets.⁴⁷ When Chairman Powell originally presented this proposal in 2002, civil rights organizations were distressed. But instead of fighting unaided as in the past, this time the minority community had the assistance of the Ameri-

can public and several other groups.⁴⁸ If not for groups like the National Association of Hispanic Journalists and Commissioners Copps and Adelstein speaking publicly about the issue, the American public might not have had the opportunity to learn the rules. More than 2 million Americans filed comments, 99% of which were in opposition.⁴⁹ But despite all the public involvement, media watchdog groups tracked only one national network reporting on the proposal at 4:30 a.m. on some day in September 2002.⁵⁰

Minority Media and Telecommunications Council Executive Director Honig stated prior to the FCC's 2003 ruling on ownership that he and several other civil rights and religious organizations wanted to propose a rule banning transactional discrimination on the basis of race and gender. Although there was generally no opposition to this proposal, the FCC eventually held that it would "decline to adopt a rule without further consideration of its efficacy as well as any direct or indirect effects on the value and alienability of broadcast licenses."⁵¹ Honig

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added that this argument connecting the ban of transactional discrimination affect the value was last made during the filibuster of the 1968 Fair Housing Act. At this time, senators argued that the policy would adversely affect the value of property.⁵² In actuality, property value in general rose after the Fair Housing Act passed.

THE PROMETHEUS RADIO PROJECT

Those who believed that the 2003 ruling, which allowed a single company to own up to one newspaper, three TV stations, and eight radio stations in the biggest markets would put women and minorities at an even bigger disadvantage against big media firms, did not give up. Several broadcasters and organizations banded together and were represented by the Media Access Project, a non-profit public interest telecommunications law firm. They named the effort, The Prometheus Radio Project.

In *Prometheus Radio Project v. FCC*, the plaintiffs argued not only that the new rules would give giant companies even more power, which was not in the interest of the American public, but that the process that led to the vote was “faulty.”⁵³ The FCC argued that it had ample authority to change the rules pursuant to the Telecommunications Act of 1996, that it took efficiencies of common ownership into account, and that it placed reasonable limits to protect smaller and minority-owned businesses.⁵⁴ In vacating the FCC’s decision, the court temporarily blocked the new rules and ordered the agency to retain the old rules during the stay.⁵⁵ Using strong language, the judges stated that the diversity index measurements used by the FCC to weigh cross-ownership employed several “irrational assumptions and inconsistencies.”⁵⁶ The Supreme Court turned down the FCC’s appeal. It seems like the FCC was focusing on economics as the measurement for what makes good policy, but there is much more to a change as big as this one, affecting an industry that plays such a unique role in society. The public opposition, noted by the Court, called for more qualitative considerations to determine if the negative sociological effects outweighed the economic benefits.

A NEW FIGHT

Despite the defeat, the FCC began a renewed effort to deregulate ownership, and civil rights organizations were again lobbying against the rules by presenting the agency with proposals to help protect diversity ownership if the rules passed. In spite of this, the December 18th ruling was the same as the 2003 ruling. In addition to requesting a delay, many groups again stated that the elimination of ownership restraints may set back the expansion of minority ownership by a generation.⁵⁷

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Referring to the ruling as a relatively minor loosening, Martin disagreed, stating that competition would guard against a con-

centration of too much power in the hands of big media.⁵⁸ In response to those calling for a delay, the FCC will likely share evidence that they held eight public hearings across the country, listened to thousands of oral comments, reviewed over 166,000 written comments, commenced ten independent studies, and sought industry input.⁵⁹

In a proactive move on December 4, 2007, the Senate Commerce Committee unanimously passed a bill to block the December 18th vote, requiring another ninety days for comments and separate hearings for both diversity and localism before the vote is taken.⁶⁰ Andrew Schwartzman, President and CEO of the Media Access Project, has promised to take the FCC back to the

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same court that rejected the 2003 rules, if Congress does not act on the Committee’s bill.⁶¹ Civil rights organizations are ready to continue the fight. Rainbow/PUSH leader, Jackson, says the ruling seems like a “bizarre act of retribution,” designed to undermine the recent progress of channels like TVOne.⁶² Most civil rights groups agree that policies allowing a la carte payment per channel, and giving local broadcasters priority carriage over cable systems would be a death knell for small and minority programmers.⁶³

SEPARATE MEASURES

The response on December 18th to the adoption of diversity measures to help women and minority-owned businesses gain access to capital was overwhelmingly positive. Some examples of these measures are changing permit deadlines, requiring proof of non-discrimination to renew a license, giving priority for eligible entities in certain duopoly situations, and revising the exception to the prohibition on the assignment or transfer of grandfathered radio station combinations.⁶⁴ The FCC will also convene an annual “Access-to-Capital” conference focused on investment and financing for women and minority owners.⁶⁵ With the analog to digital TV broadcast transition beginning in February 2009, there will be spectrum to spare, which Chairman Martin wants to lease to women and minority owners, but Commissioner Adelstein refers to this as “media sharecropping,” and not a viable alternative.⁶⁶

Despite a disagreement on some definitions, the Minority Media and Telecommunications Council was very pleased with the adoption of twelve of the minority ownership proposals it presented to the agency on behalf of the many civil rights and professional organizations it represents, such as The National Association of Black-Owned Broadcasters, and the Women’s

Institute for Freedom of the Press. It was also pleased with the thirteen proposals out for comment. Honig said that the measures taken will likely produce an increase of 5-10% in revenue and help women and minority owners secure more capital.⁶⁷ These solutions are very much in line with the requests of the National Association of Broadcasters which believes that adopting policies that emphasize public/private partnerships and rely on market-based stimulants will be the most successful strategy.⁶⁸

The only negative response to the measures was less because of the measures themselves, but more because of their timing and impact in comparison to the larger ruling. Rev. Jackson said that the passing of these measures is more of a “public relations effort intended to allay fears by offering up what is now widely seen as a consolation prize.”⁶⁹

FINDING SOLUTIONS

Some suggestions to improve the situation are small, such as making things easier by revising and simplifying the Form 323 Ownership Report to be more transparent, as well as expanding the class of owners required to file the form.⁷⁰ Some are larger solutions, such as the Diversity Credit System proposed by the MMTC in which similar to the one utilized by the EPA, credits would be attached to licenses and given or taken away based on the holder’s diversity record.⁷¹ Honig believes this will incentivize diversity, deincevntivize concentration, minimize regulatory intervention, and provide a new source of capital for minority businesses.⁷²

In dealing with sensitive issues such as race and gender, incentives are the best way to address the conflict when the government is involved, especially after *Adarand* established that the strict scrutiny standard applies to racial classifications. With the consumer power of women and minorities growing by the billions every year, the FCC should have no problems in devising incentives. *Grutter v. Bollinger*, which established that diversity itself is a compelling government interest, could work in the FCC’s favor as long as the agency does not give women and minority owners an advantage that would seem unreasonable.⁷³ If larger owners see this as unreasonable, it could invite legal action that would inundate the agency with lawsuits from owners with limitless resources. Fighting these lawsuits would occupy the agency’s time, and it would no longer be useful to anyone.

The FCC has to get behind the issues in a consistent, outspoken, and public way. Support for programs has seemed to depend only on the political makeup on the current Commission and Administration. As this fight is an uphill battle, losing momentum based on elections and appointments can be extremely detrimental. The agency needs to do a better job of acknowledging the proposals at the hearings and giving reasons for their rejection, or why there is a delay in a decision. This basic level

of respect will go a long way in making the relationship between the FCC and civil rights organizations one of partners and not adversaries.

The organizations representing minority owners need to continue to work with each other. The work of groups like the National Association of Hispanic Journalists, who got the word out to civil rights organizations, politicians, and the American public prior to the 2003 ruling, seemed to be a helpful factor in the post-ruling court decisions. The Prometheus Radio Project also showed the results of combining forces. These organizations need to continue to work with the FCC despite their differences. Even though the agency’s history is distressing and the ownership rules may be a blow to the organization’s efforts, other recent measures and changes to policy show an effort by the FCC to address the issue in a positive way. Due to the insistence of organizations like Rainbow/PUSH and MMTC, the agency has no choice. The only way to get past the rhetoric, push for the gathering of real data, and spur action, is to build the consensus among commissioners to lead the organization in the right direction.

CONCLUSION

There is a consensus that the FCC must react to the drastic changes in the telecommunication and media industries. When the ownership rules were made in 1975, the media and telecommunications landscape was very different, and devices like cable, satellite television, and the Internet did not yet exist. As Chairman Martin said in his press statement on December 18th, the FCC must find a balance between the need to support the availability and sustainability of the industry without harming diversity.⁷⁴ This is the basic challenge of marrying government regulation with market needs. The FCC has a statutory obligation to do both, and organizations like the National Association of Black Owned Broadcasters, the Diversity Task Force of the Federal Communications Bar Association, and programs like the NTIA’s Minority Telecommunications Diversity Program, will be their best source for solutions.

First and foremost, nothing of real substance can be done until the true state of minority-ownership is assessed at every level in every market, using measurements that are consistent regardless of who is performing the study, or the incumbent administration. Indeed, impartiality could be ensured by requiring a third party to conduct the investigations. The negligible status of minorities in the telecommunications arm of the industry is a glaring indictment of the FCC. With the Telecommunications Act of 1996, the FCC created legislation allowing smaller telecom owners to enter the market with less capital and less ability to build new facilities, and it missed a great opportunity to create a focus on the lag in diversity ownership.⁷⁵

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Telecommunications and the media are the ways in which people connect with one another, shaping societal discourse and presenting our culture, beliefs, leadership, and priorities to the rest of the country and the world. In turn, the media industry will also be changed by the growing numbers of people of color in

other nations, who have access to their products and services. Survival under these inevitable conditions will hinge on an industry's ability to give people what they want. More regulation is not the answer, but more collaboration, incentives, and more diverse ownership could be.

ENDNOTES

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¹ Hereinafter December 18th.

² Corey Boles, *FCC Votes To Relax Cross-Media Ownership Rule*, DOW JONES NEWSWIRES, Dec. 8, 2007.

³ Kevin J. Martin, FCC Chairman, Opening Statement at Hearing for Media Cross-Ownership, Nov. 9, 2007.

⁴ John Dunbar, *FCC: Offer New Options To Minorities*, ASSOCIATED PRESS, Oct. 12, 2007.

⁵ John Eggerton, *Minority Groups Make Last Effort to Delay Vote*, BROAD. & CABLE, December 18, 2007, <http://www.broadcastingcable.com/article/CA6513592.html> (last visited Mar. 7, 2008).

⁶ See Boles, *supra* note 2.

⁷ Minority Media and Telecommunications Council [hereinafter MMTC], *Internet \$10b, Radio \$21b, TV \$42.5b, Cable/Satellite \$54.1b, Telecommunications \$54.1b*, LAW & POLICY AT THE INTERSECTION OF MEDIA, TELECOM AND CIVIL RIGHTS, Jan. 2006 at 1.

⁸ Press Release, National Association of Black Journalists (Dec. 18, 2007) (on file with author); Press Release, *NABJ To Congress: Reverse the FCC's Media Consolidation Decision*, (Dec. 18, 2007) (on file with author).

⁹ S. Derek Turner & Mark Cooper, *Out of The Picture: Minority & Female TV Station Ownership in the United States*, FREE PRESS, Oct. 2006, at 2; MMTC, LAW & POLICY AT THE INTERSECTION OF MEDIA, TELECOM AND CIVIL RIGHTS, Jan. 2006 at 1; Alexa Top 500 Report, <http://alexa.com>, (click on Traffic Rankings & United States) (last visited Mar. 7, 2008).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See Dunbar, *supra* note 4.

¹⁵ See Eggerton, *supra* note 5.

¹⁶ Telephone Interview with David Honig (Dec. 15, 2007).

¹⁷ *Id.*

¹⁸ *Southland Television v. FCC*, 266 F.2d 686, 687 (D.C. Cir. 1959).

¹⁹ Telecommunications Act, 47 U.S.C. § 151 (1934).

²⁰ *Lamar Life Broad. Co. v. FCC*, 403 U.S. 939 (1965); *But see*, Office of Comm'n of the United Church of Christ v. FCC 359 F. 2d 994 (D.C. 1966).

²¹ *United Church of Christ*, 359 F.2d at 998.

²² Office of Comm'n of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969).

²³ Ultravision Broad. Co., Memorandum Opinion and Order, 1 F.C.C. 2d 544.

²⁴ MMTC, *supra* note 9, at 3.

²⁵ *Id.* at 13.

²⁶ *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1992) (finding the application of integration preference to be arbitrary and capricious).

²⁷ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995); *But see* *Metro Broad. v. FCC*, 497 U.S. 547, 552 (1990).

²⁸ *Adarand*, 515 U.S. at 205; *Metro Broad.* 497 U.S. at 552.

²⁹ National Telecommunications & Information Administration [hereinafter NTIA], *Falling Through The Net: Defining The Digital Divide*, July 1999, <http://www.ntia.doc.gov/ntiahome/ftn99/contents.html> (last visited Mar. 7, 2008).

³⁰ David Honig, Executive Director, MMTC, Remarks at Fordham University Conference on Diversity Metrics (Dec. 15, 2003).

³¹ *Id.*

³² *Id.*

³³ *TV 9, Inc. v. FCC*, 495 F.2d 929, 933 (D.C. Cir. 1974).

³⁴ *Garrett v. FCC*, 513 F.2d 1056, 1059 (D.C. Cir. 1975) (detailing that policies regarding regulatory radio frequency responsibility are shared by the FCC and the NTIA).

³⁵ FCC Advisory Committee on Diversity for Communications in the Digital

Age, *Recommendation on Incentive-Based Regulations*, June 1, 2004 at 1, <http://www.fcc.gov/DiversityFAC/recommendations.html> (last visited Mar. 7, 2008).

The Tax Certificate Policy allowed companies to sell broadcast or cable property to minorities in exchange for capital gains tax benefits. The Distress Sale Policy allows existing license owners looking to sell avoid an FCC Hearing and hefty fees if they sell to a minority-owned company at no more than 75% of fair market value.

³⁶ *Id.*; See also, *Multiple Ownership of AM, FM & TV Broadcast Stations*, 100 FCC 2d 74, 94 (1985).

³⁷ FCC Advisory Committee *supra* note 35, at 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 47 U.S.C. § 151.

⁴² *Id.*

⁴³ FCC Advisory Committee on Diversity for Communications in the Digital Age, *Transactional Opportunity*, June 14, 2004, at 7.

⁴⁴ FCC, *Previous Commissioner Biographies*, <http://www.fcc.gov/commissioners/previouscommish.html> (last visited Mar. 7, 2008).

⁴⁵ See FCC Advisory Committee, *supra* note 35 at 7.

⁴⁶ See Honig remarks, *supra* note 30.

⁴⁷ Juan Gonzalez & Joseph Torres, *How Long Must We Wait?*, Democracy Now!, 2004 at 17.

⁴⁸ See *id.*

⁴⁹ Michael Copps, FCC Commissioner, Remarks at the Future of Music Policy Summit, Washington, D.C., 2004.

⁵⁰ FAIR: Fairness & Accuracy in Reporting, *Broadcast Networks File FCC Comments—But Not Stories*, <http://www.fair.org/index.php?page=1633> (last visited Mar. 7, 2008).

⁵¹ See Honig, *supra* note 30.

⁵² See *id.*

⁵³ Press Release, Prometheus Radio Project, Oral Arguments on Prometheus vs. FCC, Fate of the Media Hangs in the Balance (Feb. 11, 2004).

⁵⁴ Brief of Respondents at 2, 3, Prometheus Radio Project v. FCC, No. 03-3388 (3d Cir. 2003).

⁵⁵ Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004).

⁵⁶ *Id.* at 402.

⁵⁷ See Eggerton, *supra* note 5.

⁵⁸ See Boles, *supra* note 2.

⁵⁹ Press Release, FCC, Chairman Martin's Press Statement (Dec. 18, 2007).

⁶⁰ John Eggerton, *Senate Commerce Committee Passes Bill to Block FCC's December 18 Vote*, BROAD. & CABLE, Dec. 4, 2007.

⁶¹ Ira Teinowitz, *FCC Approves Martin's Cross-Ownership Plan*, TVWEEK, Dec. 18, 2007, http://www.tvweek.com/news/2007/12/fcc_approves_martins_crossowne.php (last visited Mar. 7, 2008).

⁶² Jesse Jackson, *FCC's 'Media Sharecropping' Initiative*, S.F. CHRON., Dec. 18, 2007 at B5.

⁶³ *Id.*

⁶⁴ Press Release, FCC, FCC Adopts Rules to Promote Diversification of Broadcast Ownership (Dec. 18, 2007).

⁶⁵ *Id.*

⁶⁶ See Dunbar, *supra* note 4.

⁶⁷ Press Release, MMTC, MMTC Applauds The FCC's Minority Ownership Decision (Dec. 18, 2007).

⁶⁸ Reply Comments at 2, NAB to FCC, MB Docket 121, 277, 4-228, 1-235, 01-317.

⁶⁹ See Jackson, *supra* note 62.

⁷⁰ See Turner, *supra* note 9.

⁷¹ See Honig, *supra* note 30.

⁷² *Id.*

⁷³ *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003) (holding that Univ. of Mich. Law School can use the need for diversity as a factor in admissions).

⁷⁴ See FCC, *supra* note 59.

⁷⁵ Telecommunications Act, 47 U.S.C. § 151 (1996).