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Minority Media Ownership Workshop  
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I thank the Media Bureau for holding this workshop and for asking some important questions. Unfortunately, there are no easy answers. The complicating factors include the paucity of relevant case law, the FCC's failure to evaluate the impact of its current race and gender neutral policies, the lack of basic data needed for analysis, and the lack of specific proposals.

The paucity of relevant case law makes it difficult to determine what the law requires. Only two cases directly address the constitutionality of employing racial or gender preferences and both are rather old. The 1990 Supreme Court decision in *Metro Broadcasting* upheld two FCC policies designed to promote station ownership by minorities. One was the consideration of race as one of many factors in comparative hearings to select among competing applicants for a new broadcast station. The other was the FCC's "distress sale policy" which allowed the owner of a broadcast station at risk of losing its license, to avoid a hearing and recoup some value by selling the station at a reduced price to a qualified minority buyer.

The Court found these policies constitutional under intermediate scrutiny. Subsequently in *Adarand*, the Court applied strict scrutiny to federal government distinctions based on race and overruled *Metro Broadcasting* as to the appropriate standard of review. Since the *Metro Broadcasting* Court only evaluated the evidence under intermediate scrutiny, it did not address whether the FCC's race-based policies could pass muster under strict scrutiny.

The DC Circuit's 1992 decision in *Lamprecht* found that the FCC's policy of considering gender as a factor in awarding new broadcast licenses violated equal protection. In the context of a specific comparative hearing, the FCC had awarded a preference to an applicant proposing to have women owners working in station management similar to (but less than) the preference awarded to an applicant with minority owners working in station management. Applying intermediate scrutiny, the court found that the FCC failed to establish even a substantial government interest in increasing the number of station owned by women. In fact, the FCC had no factual record as to either past discrimination against women or their contribution to diversity. Nor did it attempt to build a record justifying gender preferences on remand.

Thus, neither *Metro Broadcasting* nor *Lamprecht* provides guidance as to what is necessary to comply with the guarantee of equal protection. Nor do other cases involving government contracts, employment and university admissions provide much guidance because they arise in vastly different contexts. The most we can conclude from these non-broadcast cases is that strict scrutiny applies where race is a factor and intermediate scrutiny applies where gender is a factor.

Under strict scrutiny, the FCC would have to show that the race-based measure serves a compelling government interest and is narrowly tailored to achieve that interest.<sup>1</sup> This test can only be applied to a specific proposal in the context of the record developed to support the proposal. In other words, whether targeted race-based measures for promoting minority

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<sup>1</sup> My focus on race-based measures should not be interpreted as suggesting that the FCC should not also assess the nexus between women-controlled stations and diversity of content, the effect of sex discrimination on women's ability to obtain and operate broadcast stations, and the effectiveness of current policies designed to increase ownership by women. Indeed, because gender-based measures are subject to lower constitutional scrutiny, it would be easier for the FCC to establish such policies and they could provide a means of testing the effectiveness of different types of preferences.

ownership can pass constitutional muster cannot be answered in the abstract. The FCC has to identify the compelling interest it seeks to achieve and show how the race-based measure is narrowly tailored to achieve that interest.

Assuming that the FCC can demonstrate that increasing the racial diversity of broadcast station owners is a compelling governmental interest on remedial or diversity grounds or both, a topic which the other panelist will address, I want to address the measures that the FCC could adopt, race-based or otherwise, to increase the number of minority and women-controlled broadcast stations.

The FCC lacks the authority to reinstate two race-based measures used effectively in the past to further minority ownership, that is, preferences in comparative hearings and tax certificates. In 1997, Congress required the FCC to use auctions to select among mutually exclusive applicants for commercial broadcast station licenses, thereby eliminating comparative hearings. Congress also repealed tax certificates, which had provided tax incentives for selling stations to minorities.

A third race-based measure – distress sales, which was upheld in *Metro Broadcasting* – has since been modified to allow distress sales to any entity meeting the Small Business Administration’s definition of a small business. Indeed, the FCC has several other policies ostensibly designed to promote opportunities to minorities and women that utilize the SBA criteria. Yet, to my knowledge the FCC has never evaluated the effectiveness of these policies. Indeed, it is unclear whether the FCC even has any idea which broadcasters qualify as small businesses under the SBA criteria, much less what proportion are controlled by minorities and women.

Nor has the FCC evaluated the effectiveness of the failing station solicitation rule. This rule requires a party that seeks a waiver of the local television ownership limits to sell a failing station to another station in the same market to demonstrate efforts to find an out-of-market buyer. Adopted in 1999 to address the decline in minority broadcast ownership, the FCC reaffirmed in 2008 that the failing station solicitation rule was “necessary to ensure that out-of-market buyers, including *qualified minority broadcasters*, have notice of, and an opportunity to bid for a station before it combined with an in-market station.”<sup>2</sup> Nonetheless, I do not know of a single instance where this rule facilitated a sale to a minority owner. Nor to my knowledge, has the FCC analyzed the effectiveness of this rule, even though it is probably the only organization with access to the necessary data.

To meet the requirement that race-based measures be narrowly tailored, the FCC has to show that it considered race neutral solutions and found them insufficient. Clearly, the FCC cannot meet this test if it does not analyze the effectiveness of its current policies. Of course, evaluating these policies is difficult without relevant and reliable data. Although the FCC revised Ownership Form 323 in 1998 to collect the race and gender of station owners, it failed to undertake basic steps to ensure the reliability and completeness of the data. And even though problems with the data were discovered and brought to the FCC’s attention in 2006, the FCC has yet to fix these problems. Indeed, the date for filing revised Form 323 has been suspended indefinitely. Thus, the FCC and the public still lack accurate data about the extent of broadcast station ownership by minorities and women.

To demonstrate narrow tailoring, the FCC must also give good faith consideration to other possible race-neutral alternatives. One such race neutral alternative would be to adopt and

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<sup>2</sup> 2006 Quadrennial Regulatory Review, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 at ¶109.

enforce stricter ownership limits. The excessive consolidation permitted under existing rules has resulted in the loss of minority owners and made it more difficult for those that remain to compete. Tightening the rules would make more stations available at more affordable prices. Other race and gender neutral proposals such as one by Media Access Project to create a new class of full power commercial TV stations using the multiplexed facilities of digital television stations, also merit careful consideration.

Assuming that the FCC concludes that existing race-neutral measures have not worked and the alternatives are unworkable, it still needs to identify specific race-based measures that would work. For example, giving “bidding credits” to minority participants in auctions of broadcast licenses would not be effective if there are only a few licenses available to be auctioned.

The most recent Supreme Court decisions on racial preferences – the Seattle Schools case and the New Haven Firefighters case – while not on point, do indicate that it will be difficult to convince a majority of the current Justices that race-based preferences are constitutional. This does not mean, however, that the FCC should not even try. The FCC should assess the effectiveness of its existing policies and consider the viability of other race-neutral proposals. It may turn out that race-neutral policies do increase ownership of broadcast stations by minorities and women. But if the race neutral policies prove ineffective, the FCC will have built a record to justify the adoption of meaningful race-based measures.