
RACISM IS IN THE AIR: THE FCC'S MANDATE TO PROTECT MINORITIES FROM GETTING SHORTCHANGED BY ADVERTISERS

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Racist! It is a dirty word. But over the last year the Federal Communications Commission ("FCC" or "the Commission") has characterized the buying practices of radio advertisers in the United States as racist and racially discriminatory.¹ The Commission's accusations are based on findings of a survey released in 1999 that indicate minority-formatted radio broadcast stations earn an average of 63% less than other stations with comparable market shares.² FCC Chairman William Kennard has encouraged the advertising industry to work to eliminate advertising discrimination.³ However, the industry has made very little progress and continues these discriminatory advertising practices.

I. INTRODUCTION

A. Discrimination

Consider, for example, WSKQ, a Hispanic radio station in New York City. In 1997, when the radio station ranked fourth in terms of audience, it only ranked thirteenth in ad revenue.⁴ In fact, WSKQ held a 6.1 commercial audience share and earned only \$21.5 million in 1997. Two other general market stations with commercial audience shares of only 4.6 and 5.5 earned \$34.8 million and \$37.3 million, respectively.⁵ In 1998, WSKQ tied WLTW (Light/FM) for the number one rated station in New York. On a national level, WSKQ's morning radio show ranked second only to Howard Stern in 1998.⁶ Yet, the station still had to work to convince advertisers of their audience's value as consumers.⁷ WSKQ Station Manager Luis Alvarez at

¹ See *American Advertising Federation Responds to FCC Study Into Advertising and Minority Media Buying Practices* (Jan. 13, 1999) <www.fcc.gov/speeches/kennard/statements> (applauding efforts of the American Advertising Federation ("AAF") in developing a Blue Ribbon Task Force to reduce current discriminatory practices in the advertising market); William E. Kennard, *Selling Advertisers on Serving All Americans*, Remarks Before the AAF (Feb. 22, 1999) <www.fcc.gov/speeches/kennard> (suggesting that discriminatory advertising practices are harmful to the entire broadcast community and that the advertising community should work toward a solution); William E. Kennard, Address at the AAF News Conference (Apr. 21, 1999) <www.fcc.gov/speeches/kennard/statements> (applauding the efforts of the True North in combating current advertising discrimination); *FCC Chairman Kennard Details Three Part Strategy to Narrow the Digital Divide Between Information Haves and Have-Nots* (July 28, 1999) <www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9055.t> (suggesting that one of three issues that must be solved in order to reduce the "digital divide" is the practice of advertising discrimination) [hereinafter *Kennard's Strategy to Narrow Digital Divide*]. See also Susan Ness, *Speaking Clearly and Succinctly*, Remarks Before the AAF National Governmental Affairs Conference (Mar. 25, 1999) <www.fcc.gov/speeches/ness> (noting recent efforts of the AAF to change traditional practices).

² See Kofi Asiedu Ofori, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations*, at iii (Jan. 1999) <www.fcc.gov/bureaus/mass_media/informal/ad-study/adsynopsis.html> [hereinafter *The Minority Broadcast Advertising Study*]. The generalizations or conclusions made with regard to television advertising were inclusive due to the nature of the material. Television programming is not targeted to such a narrow demographic audience as radio broadcast is. However, the study suggested that the Commission conduct further, more extensive research in this area. See *id.* at ii.

³ See *American Advertising Federation Responds to FCC Study Into Advertising and Minority Media Buying Practices* (Jan. 13, 1999) <www.fcc.gov/speeches/kennard/statements>; William E. Kennard, *Selling Advertisers on Serving All Americans*, Remarks Before the AAF (Feb. 22, 1999) <www.fcc.gov/speeches/kennard>; William E. Kennard, Address at the AAF News Conference (Apr. 21, 1999) <www.fcc.gov/speeches/kennard/statements>; *Kennard's Strategy to Narrow Digital Divide*, *supra* note 1.

⁴ See Quincy McCoy, *Urban Myths . . . and The Truth*, GAVIN, Sept. 18, 1998, at 13 [hereinafter McCoy].

⁵ See *The Minority Broadcast Advertising Study*, *supra* note 2, at 35.

⁶ See McCoy, *supra* note 4, at 13.

⁷ See *id.* (indicating that although ad revenues had in-

tributes this disparity directly to the fact that his station has a Hispanic audience. One advertiser for Ivory Soap refused to purchase time on that station. The advertiser claimed that "Hispanics don't bathe as frequently as non-Hispanics."⁸ This discriminatory advertising practice is commonly referred to as a "no Spanish dictate."⁹

The FCC has reviewed discriminatory practices on more than one occasion in the past.¹⁰ The most recent study conducted by the Commission, called the *Minority Broadcast Advertising Study*, was the result of heightened interest in the issue. The Commission chartered the study, which was conducted by the Civil Rights Forum on Communications Policy,¹¹ shortly after a particularly embarrassing incident of advertising discrimination became public.

The incident that precipitated the study was a memo that has become known as the "Katz Memo," which was issued in April of 1998 by a reputable media representative firm, the Katz Media Group.¹² The firm gained a great deal of negative publicity for circulating a memo to its sales

staff that advised against running ads on urban-formatted stations because businesses "want prospects, not suspects."¹³ Although the Katz Media Group later apologized for the incident and vowed to ensure a more sensitive, diverse staff, the incident inflamed minority broadcast stations across the nation. Since this incident, there have been numerous public responses designed to raise national awareness of advertising discrimination. Civil rights leader Al Sharpton staged a protest at an advertising headquarters located on New York's Madison Avenue and has since met with the major producers to implement advertising practice changes.¹⁴ Radio personality Tom Joyner has used his morning show as an opportunity to air complaints of specific problems faced by minority media.¹⁵

Also, following the Katz Memo and the FCC-chartered study, Vice President Al Gore announced the formation of a federal interagency working group to examine current advertising practices and their effect on minority media out-

creased over the previous five years, it was a constant battle to convince advertisers that their audience was a valuable commodity. Just five years prior, Macy's refused to purchase time on the station because "it would increase shoplifting."

⁸ *Minority Radio Still Fighting Advertiser Discrimination*, THE FORUM CONNECTION, at 3 (Sept. 30, 1999) <www.civilrightsforum.org/connect990930.html>.

⁹ "No Urban/Spanish dictates" are practices whereby advertisers prohibit ad placement on stations with urban or Spanish format. "Urban" is industry jargon for a format aimed at black audiences. See *The Minority Broadcast Advertising Study*, *supra* note 2, at ii, 28. There is an additional problem in the industry known as "minority discounting." Minority discounting is a method of price discrimination where advertisers refuse to pay minority-formatted stations the same rate they would otherwise pay to a general market-formatted station with comparable audience size. See *id.*; see also C. Edwin Baker, *Giving The Audience What It Wants*, 58 OHIO ST. L. J. 311, 318 (1997). The *Minority Broadcast Advertising Study* shows that 75% of all stations owned by minorities are classified as minority format. Only 8% of stations owned by majority group members are classified as minority format. Where minorities own 116 stations, majority owners control 267 minority-formatted stations. But because of the greater tendency of minority owners to serve the minority community, practices such as "no Urban/Spanish dictates" and "minority discounts" have a disproportionate effect on minority broadcasters as well as minority-formatted stations. See *The Minority Broadcast Advertising Study*, *supra* note 2, at 22-23.

¹⁰ See *In Re Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules To Include EEO Forfeiture Guidelines, Order and Policy Statement*, 13 FCC Rcd. 6322 (1998); *In Re Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules*

To Include EEO Forfeiture Guidelines, Order and Proposed Rulemaking, 11 FCC Rcd. 5154 (1996); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); *In Re Petition for Rulemaking to Request Licensees to Show Non-discrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.2d 766 (1968).

¹¹ See *The Minority Broadcast Advertising Study*, *supra* note 2, at ii.

¹² See Mira Schwirtz, *Ratings Racism: When No. 1 Is Not*, MEDIA WEEK, June 22, 1998, at 14; see also *Minority Radio Still Fighting Advertiser Discrimination*, THE FORUM CONNECTION (Sept. 30, 1999) <www.civilrightsforum.org/connect990930.html> [hereinafter *Minority Radio Still Fighting*]. A "representative firm" or "rep. firm" represents broadcasters and solicits advertising business on their behalf. Similar to advertising firms who seek broadcasters, these rep. firms seek advertisers on behalf of the broadcasters.

¹³ *Minority Radio Still Fighting*, *supra* note 12.

¹⁴ See Stuart Elliott, *Advertising: Al Sharpton meets Madison Ave. and Both See Progress in Multicultural Marketing Efforts*, N.Y. TIMES, Jan. 19, 1999; see also George Curry, *Campaign for Respect: Rev. Al Sharpton's National Action Network Is Targeting Larger Shares of Madison Avenue's Ad Dollars For Minority Markets*, EMERGE, May 1999, at 35 (reporting Sharpton's campaign to fight advertising discrimination).

¹⁵ On one specific occasion, radio personality Tom Joyner, host of the nationally syndicated "The Tom Joyner Morning Show," aired a request that African American listeners mail to him receipts for purchases they have made at CompUSA. He alleged that CompUSA buys virtually no advertising time on black media although their customer base consists of an enormous minority population. His intent was to mail the boxes of receipts to CompUSA to impress upon them the enormity of their customers who are black. See *Minority Radio Still Fighting*, *supra* note 12.

lets.¹⁶ The interagency working group is an informal organization composed of representatives from the FCC, the Federal Trade Commission, the Department of Commerce, Congress and the Office of the Vice President (The Office of Reinventing Government).¹⁷ The primary directive of the interagency working group is to partner with industry to develop an awareness of advertising discrimination and develop industry solutions. Rather than promoting federal regulation, they seek to promote "best industry practices."¹⁸ So far the working group has made no public findings.

B. Industry Response

At a conference hosted by the American Advertising Federation ("AAF") in response to the problem of advertising discrimination, Chairman Kennard proposed that industry develop a solution on its own.¹⁹ He challenged the advertisers, advertisers' agencies and media representatives to consider adopting a simple code of nondiscrimination and implement it within the industry.²⁰

Since the FCC study and the Katz memo, the broadcast industry has a heightened awareness of racial discrimination in the marketplace, and many broadcasters have made efforts to promote diversity in broadcast media, acting simply on their distaste for the present situation. The FCC recently reported that many broadcasters, although no longer required to do so by law, continue to abide by equal employment opportunity

principles.²¹

A significant step was taken more recently when a group of leading broadcasters announced the formation of an investment fund designed to spur ownership of television and radio stations by minorities and women.²² This fund, known as the "Prism Fund," was announced by the President of CBS and the Chairman of Clear Channel Communications, who said that they intended to demonstrate that the private sector can sometimes act to address public issues more effectively than the government.²³ With an initial investment of \$175 million, this initiative shows enormous commitment on the part of broadcasters to address the problem.²⁴

A few advertisers also are recognizing the enormous market potential available to them through minority markets. Wal-Mart, one of the largest retail chains in the United States, has targeted Hispanic audiences through Hispanic formatted media. Last year, Wal-Mart doubled the amount of money spent on targeted minority consumers and spent nearly half its advertising budget on minority media.²⁵ Although a tremendous step to promoting diversity within the broadcast market, the Prism Fund is not accomplishing the same results as Wal-Mart. The Prism Fund is simply not addressing the discrimination that minority broadcasters face once they enter the marketplace. Rather, it is only aimed at establishing greater minority ownership in the industry. Without addressing the issue of advertising discrimination, the

¹⁶ See Stuart Elliott, *White House Pushes Business for Minority-Owned Agencies*, N.Y. TIMES, Feb. 23, 1999, at C8 (focusing on the affects of advertising practices on both ad agencies and media outlets; Gore's comments were made to an AAF meeting).

¹⁷ See *id.* Note that a "working group" is an informal organization, not bound by the same regulatory burdens of a formal executive "task force." Although the original working group also consisted of members from the Small Business Administration and the Department of Justice, those organizations no longer participate. In addition to official members, the AAF has worked in a coordinated effort to support the efforts of the working group and provides a representative to all working group meetings.

¹⁸ *Id.*

¹⁹ See William E. Kennard, *Selling Advertisers on Serving All Americans*, Remarks Before the AAF (Feb. 22, 1999) <www.fcc.gov/speeches/kennard/spwek908.htm>.

²⁰ See *id.* Kennard encouraged attendees at the conference to consider the following three principles when developing a voluntary code of industry conduct: "[u]se accurate information about consumer purchasing practices to ensure

fair access to information, promote fair competition [a]nd expand opportunity for all Americans." *Id.*

²¹ See Public Interest Obligations of Television Broadcast Licenses, *Notice of Proposed Rulemaking*, 65 Fed. Reg. 4211, 4215, para. 30 (2000).

²² See *Broadcasting Industry Announces Minority Investment Fund; Fund's Ultimate Goal Is \$1 Billion In Purchase Power To Help Increase Minority Ownership of Media Properties* (Nov. 3, 1999) <www.nab.org/pressrel/releases/5899.asp> (announcing the commitment of funds by numerous broadcasters).

²³ See *id.*

²⁴ See *id.*

²⁵ See John Consoli & Katy Bachman, *Ethnic Expansion; AAF, True North Create New Minority Unit*, MEDIAWEEK, Apr. 26, 1999, at 4 (stating that since February 1998, the retailer had spent \$1 million to \$2 million on Radio Unica, a Hispanic radio network). The editors of MEDIAWEEK estimate that this number is half of Wal-Mart's total radio budget. See *id.* This is only one example of industry recognizing the value of minority markets and utilizing minority media to reach those markets.

Prism Fund is setting up minority broadcasters for failure.

It would seem that the above industry examples are a sign of change within the broadcast industry. The discrimination problem, however, is not being solved. Wal-Mart, an exception in the industry, was previously an industry leader with regard to utilizing minority media.²⁶ Even before the Katz Memo was publicized, nearly one quarter of Wal-Mart's annual marketing budget was spent on Hispanic radio.²⁷

Searching for solutions, one organization, a joint federal working group, has the goal of highlighting industry "best practices" in an attempt to highlight models the rest of the industry should follow. Their goal is to avoid federal regulation. But federal regulation/government intervention is sometimes necessary to stop discrimination; though somewhat costly to society at large, government intervention has proven an appropriate resolution to discrimination.²⁸

Federal action must be taken to prevent this type of advertising discrimination.²⁹ If there is no regulatory restriction regarding these advertising practices, advertisers will continue to conduct business as usual. The FCC has a congressional mandate to promote diverse views on the airwaves.³⁰ This congressional mandate gives the FCC author-

ity to take action to diminish the inequity of minority discounts. The following note will: I) define discriminatory advertising practices; II) state the Commission's authority to act on this type of discriminatory practice; III) discuss why the appropriate response is government intervention; and IV) propose specific actions that the Commission should take to prevent advertising discrimination.

II. ADVERTISING DISCRIMINATION

The decision to purchase "air time" from broadcasters involves developing a detailed marketing plan to identify target consumers. By developing specific media objectives, advertisers are better able to market their products effectively. Typically, advertisers identify the target in terms of a demographic description³¹ (e.g. females, ages 25-45, with household incomes above \$40,000). Airtime is purchased from media outlets patronized by the target groups most likely to consume the advertisers' products.³²

The process of selecting an advertising venue involves evaluating a number of factors.³³ A number of criteria affect this decision-making process and may account for the no Urban/Spanish dictates and minority discounts.³⁴ The *Minority Broadcast Advertising Study* indicated that certain indus-

²⁶ See *id.*

²⁷ See *id.*

²⁸ See Andrew I. Batavia, *The Americans With Disabilities Act: Social Contract or Special Privilege: Ideology and Independent Living: Will Conservatism Harm People with Disabilities?* 549 ANNALS 10 (1997) (arguing government intervention is necessary to prevent discrimination of disabled persons and noting that the argument centers around the premise that you have a small group being dominated by a large force); Thomas O. McGarity, *The Administrative State at a Crossroads: The APA at Fifty: The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996) (stating that one cannot always depend on the free market because "consumers or workers may have insufficient information to make rational choices; companies may impose uncompensated costs or risks (externalities or spillovers) on other private parties; or transaction costs, free riders or holdouts may render private bargains infeasible"); Laura G. Dooley & Robert S. Gaston, *Stumbling Toward Equity: The Role of Government In Kidney Transplantation*, 1998 U. ILL. L. REV. 703 (arguing that government intervention is necessary in kidney transplants to protect the public good and prevent historic racial discrimination of black kidney transplant patients) (1998); and DAVID L. KIRP, MARK G. YUDOF & MARLENE S. FRANKS, GENDER JUSTICE 137 (1987) (suggesting that government intervention is necessary to prevent sexual discrimination).

²⁹ See generally *The Minority Broadcast Advertising Study*, *supra* note 2 (suggesting that the FCC take the lead in conducting more intense studies and developing a resolution).

³⁰ See 47 U.S.C. § 151 (1999). Section 151 describes the purpose of chapter 5, regulating wire or radio communication, and also creates the FCC. It states:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law.

Id.

³¹ See *The Minority Broadcast Advertising Study*, *supra* note 2, at 25.

³² See *id.*

³³ See *id.* (referring the reader to "Overview of Media Planning" at Diagram A, app. A). The overview breaks down the media planning process into the following six steps: 1) marketing objectives; 2) marketing strategies; 3) media objectives; 4) media strategies; 5) decisions implementing strategies (tactics); and 6) media buying. These six steps, Ofori suggests, are the process by which advertisers select a media to reach their target consumer. See *id.*

³⁴ See *id.* at 26-27. In the survey, The Civil Rights Forum found multiple, potential influences on the decision-making

try misconceptions are based, at least in part, on racial/ethnic stereotypes.³⁵

In 1997, the New York Volvo dealers association adopted the following demographic profile for a media-buying campaign: education must be college graduate or higher; annual household income of \$75,000; age range of 25–54.³⁶ Without stipulating race, the income and education demographics implicitly circumvented radio stations that serve primarily Black and Hispanic consumers in New York.³⁷ In an attempt to win the Volvo account, Emmis Broadcasting³⁸ (“Emmis”) conducted specific market research.³⁹ Emmis found little correlation between Volvo’s demographic profile and the vast majority of Volvo owners. In fact, the qualitative data employed by Emmis proved that 80% of the Volvo owners in New York City did not fit Volvo’s profile.⁴⁰ Nearly 29% were not between the ages of 25 to 54; more than 60% had incomes less than \$75,000; and almost 65% had not graduated from college.⁴¹ After presenting specific market information to the advertisers that indicated urban listeners spent similar amounts on new cars as the audiences of general-format radio stations, the advertiser still decided not to buy from WRKS on grounds independent from the market research.⁴²

The above issue regarding Volvo advertising is an example of “no Urban dictates.” These “no Urban/Spanish dictates” and minority discounts cause minority-formatted radio stations to suffer financially from their inability to convince adver-

tisers of the viability of the minority consumer market. Although it is unfortunate that minority broadcasters suffer from these practices, one might ask, “What is wrong with advertisers discriminating against certain market groups if there are differences between certain demographic groups? What is wrong with businesses deciding where their advertising dollars are best spent? Is that really discriminatory?”

The difference between discriminating against certain demographic groups and choosing where one’s advertising dollars are best spent is that one practice may be racial discrimination and the other smart business. Intervention is necessary to prevent racial discrimination being perpetuated by market forces.⁴³ A vibrant democracy is based on the equal opportunity for all voices to be heard. American radio airwaves are a public resource that should not be governed by racially motivated advertising dollars. Rather, radio airwaves should be protected for the use by all American voices. Business decisions should be based on statistical data devoid of racial bigotry.

III. THE COMMISSION’S AUTHORITY

The Commission’s authority to prevent discrimination is present on two fronts: their congressional mandate to promote diversity and their ability to consider anti-competitive activities when licensing broadcasters.

processes:

[R]acial/ethnic minority consumers are incorrectly stereotyped as inappropriate for certain luxury products or services; stations that program to minority listeners are excluded based on average listener income, regardless of data about consumption patterns; the desire to disassociate a company’s image from minority consumers; language barriers, in the case of Hispanic radio; unfounded fears that minority consumers pilfer; media buyers’ unfamiliarity with the consumer habits of minorities; efforts by broadcasters and/or their national sales representatives to discourage advertisements on minority-formatted station; the belief that minorities can be reached through the general media.

Id.

³⁵ The findings of this study were based on a survey of broadcasters and advertisers in the Washington D.C. area, the eighth largest market. It was clearly noted in their findings that when surveying advertisers, responsiveness to ads on urban and Spanish stations was not given as a reason for not purchasing media time from those stations. *See id.* at 5, 36–43.

³⁶ *See id.* at 25.

³⁷ *See id.*

³⁸ Emmis Broadcasting is the owner of a popular black-formatted radio station in New York. *See id.*

³⁹ *See id.*

⁴⁰ The data used by Emmis was gathered by Scarborough Reports, a division of the Arbitron Co. that conducts broadcast market research. This information was provided to the Civil Rights Forum on Communications Policy by Judith Ellis, Senior Vice President of Emmis Radio and General Manager of WRKS-FM. *See id.* at 25 n.61.

⁴¹ *See id.* at 25.

⁴² *See id.* at 26. The station manager reported:

We went to the buying service. They gave us a lot of time. We got to see people right up the line; the account people. They couldn’t say no. It was right there in black [and] white; we were showing them. And then it got down to—what we were told by the buying service—was the head of the dealership who said, ‘I just don’t want to. We just don’t want it on that radio station.’ . . . I don’t believe the criteria ever really mattered to begin with. I think to a great degree the criteria exist so that they can eliminate whoever they want to eliminate, i.e. the Black station. And they buy whoever they want.

Id.

⁴³ *See supra* note 30 and accompanying text.

A. Congressional Mandate to Promote Diversity

Nearly 95% of Americans listen to radio each day, an average of more than 20 hours a week.⁴⁴ Due to their use of public airwaves and the significant impact they have on society, broadcasters have a special role in serving the public. For more than seventy years, broadcasters have been required by the Commission to serve the “public interest, convenience and necessity.”⁴⁵ The basis of the Commission’s authority lies in its own mandate to provide for the “public convenience, interest or necessity.”⁴⁶ This section of the Communications Act of 1934⁴⁷ (“Communications Act”) thus provided the FCC with the broad responsibility of implementing the public interest requirement.⁴⁸ Without question, this public interest requirement is the “touchstone” of the Commission’s statutory role in granting broadcast licenses.⁴⁹ Under the Communications Act, as amended, the FCC may issue, renew or approve the transfer of a broadcast license only upon first finding that doing so will serve the public interest.⁵⁰

Presently, broadcasters must comply with numerous affirmative public interest requirements. Broadcast licensees are required to cover issues facing their communities; comply with statutory

political broadcasting requirements regarding rebuttal opportunities,⁵¹ charges for political advertising and reasonable access for federal candidates,⁵² and meet license obligations regarding sponsorship identification⁵³ and equal employment opportunities.⁵⁴ The Commission imposes these requirements on broadcasters because of the importance they hold in serving the public interest. Moreover, the Commission finds that the requirements serve to ensure the broadcaster is serving that interest. This public interest concept is based on the idea of spectrum scarcity.⁵⁵ Spectrum scarcity necessitates that only a limited number of individuals may use the airwaves for radio broadcast. Because of this limit on an important natural resource, Congress has authorized the Commission to license broadcasters to use portions of the airwaves generally to serve the “public interest, convenience and necessity.”⁵⁶

The Telecommunications Act of 1996⁵⁷ (the “Act” or “1996 Act”), promotes a public policy of diversity in the media through this broad “public interest, convenience and necessity” mandate.⁵⁸ Although diversity is not specifically defined as a goal of the Act, numerous sections indicate strong congressional intent for the maintenance of diversity by the Commission.⁵⁹ Complying with this

⁴⁴ See William E. Kennard, *Address to the National Association of Broadcast Radio Convention* (Oct. 16, 1998) <www.fcc.gov/speeches/kennard/spwek852.html>.

⁴⁵ *New York Central Securities Corp. v. U.S.*, 287 U.S. 12, 25 (1932) (affirming the FCC’s criterion that broadcast licensing decisions be guided by the “public interest, convenience or necessity.”). Although this licensing standard leaves room for wide discretion and does not lend itself to application with “exactitude,” it is considered as concrete as complicated factors for judgment permit. See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), *aff’g*, *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

⁴⁶ 47 U.S.C. § 303 (1999).

⁴⁷ Title I, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–714).

⁴⁸ See 47 U.S.C. § 303.

⁴⁹ See *Public Interest Obligations of TV Broadcasters*, *supra* note 21, at para. 1 (restating what the Commission communicated). This role of the FCC has been upheld and recognized by the following courts: *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 31 (1950); and *Regents of N.M. College v. Albuquerque Broad. Co.*, 158 F.2d 900, 906 (1947).

⁵⁰ See 47 U.S.C. § 303(l).

⁵¹ See 47 U.S.C. § 315 (1999); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the statutory authority of the FCC to promulgate regulations requiring licensees to offer reply time to individuals personally attacked during presentation of views on public issues or to political

opponents of those candidates for public office who were endorsed in a broadcast).

⁵² See 47 U.S.C. § 315.

⁵³ See 47 U.S.C. § 317(a)(1) (1999).

⁵⁴ See *In Re Review of Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, *Report and Order*, MM Dkt. Nos. 98-204, 96-16, FCC 00-20 (rel. Feb. 10, 2000) [hereinafter *EEO Order*].

⁵⁵ See *National Broad. Co. v. U.S.*, 319 U.S. 190 (1943) (introducing the concept of spectrum scarcity); *Red Lion*, 395 U.S. at 392 (discussing spectrum scarcity as a problem unique to broadcasting).

⁵⁶ 47 U.S.C. § 307(a) (1999).

⁵⁷ Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

⁵⁸ 47 U.S.C. § 309(a) (1999).

⁵⁹ See *id.* at § 303(f), (g), (r) (authorizing the Commission to license and regulate use of the radio spectrum “as public convenience, interest or necessity requires,” to “generally encourage the larger and more effective use of radio in the public interest and to enact regulations to carry out the provisions of the Act”). The Supreme Court has held that § 303(r) confers authority on the Commission to issue regulations codifying its view of the public interest licensing standard so long as that view is based on consideration of permissible factors and is otherwise considered reasonable. See *FCC v. National Citizens Committee for Broad.*, 436 U.S. 775, 793 (1978). Section 307 directs the Commission to grant and renew broadcast licenses “if public convenience, interest or ne-

mandate, the Commission has wide discretion in determining questions both of public policy and of procedural policy in making and applying appropriate rules.⁶⁰ Although this discretion is somewhat vague, it has been recognized by courts as a basis for the theory that diversification in mass media serves the public interest by promoting diverse programming.⁶¹

Moreover, Section 151 was amended by the Act to make the Commission's mandate clear that it is to regulate interstate and foreign communications services so that they are "available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex."⁶² Section 151 thus gives the Commission the right to enforce other provisions of the Act under the guidance that the provisions should not negatively impact diverse populations.⁶³ This recent amendment, which applies to all entities subject to the Communications Act,⁶⁴ amplifies the Commission's general public interest mandate to ensure that broadcasting and other programming services serve the needs and interests of all sectors of the community. This also indicates more specifically that such services shall be provided to all Americans without discrimination on the basis of race or any other classification. In light of this mandate, the Commission has sought to ensure that licensing of broadcast stations is available to all persons, without regard to sex, race, national origin or religion.

The FCC has significant authority to ensure broadcast diversity under Section 309 of the Act, which covers the Commission's duty to grant licenses. Section 309 gives the Commission the ability to give preferences to applicants where the

granting of a license would result in media diversification.⁶⁵ The 1996 Act also modified the Commission's procedures for processing broadcast renewal applications and refined the standard to be applied when determining whether to grant the applications.⁶⁶ As amended, the Communications Act directs the Commission to grant a license renewal application only if it finds, with respect to the station at issue, that the licensee has served the public interest requirement; the licensee has not committed any serious violations of the Act or FCC rules; and that the licensee has not committed a series of violations of the Act or rules that constitute a pattern of abuse.⁶⁷ The 1996 amendment thus clarifies that the public interest standard is broader in scope than compliance with any specific provisions of the Act or the Commission's rules. The development of certain criteria that would prohibit all broadcasters from engaging in business with those who engage in discriminatory advertising would promote diversity and the public interest within the meaning of sections 151 and 309. Referring to the "public interest, convenience and necessity" licensing standard, the Commission stated in the recently released *EEO Order*:

While we have grappled over the years with the task of giving form and content to that statutory mandate, we have no doubt that it requires us to deny licenses to those who would discriminate on the basis of race, ethnicity or gender. Such persons do not have the basic character qualifications to hold a valuable government license.⁶⁸

As this statement demonstrates, the Commission evaluates discriminatory practices seriously, as well as character qualities of those licensees who discriminate.

cessity will be served thereby." 47 U.S.C. § 307(a). The Commission is directed by § 309 to determine whether the "public interest, convenience and necessity will be served" by the grant of license applications, renewals and modifications. *Id.* at § 309(a). Section 310(d) imposes the same standards on transfer applications. *See id.* at § 310(d).

⁶⁰ *See Ward v. FCC*, 108 F.2d 486, 491 (D.C. Cir. 1939).

⁶¹ *See National Citizens Committee for Broad.*, 436 U.S. at 780. The public interest requirement has also been detailed by the Commission. *See generally EEO Order*, *supra* note 54, at 22, para. 48; *In Re Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Notice of Proposed Rulemaking*, 13 FCC Rcd. 23004, 23019-22, para. 41 (1999); *In Re Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd. 12903, 12904 (1999); *In Re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 11

FCC Rcd. 19341, para. 31 (noting where public interest requirements determined Commission decision-making in the competitive bidding process).

⁶² 47 U.S.C. § 151 (emphasis added).

⁶³ *See id.*

⁶⁴ *See H.R. Rep. No. 104-458*, at 143 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 155.

⁶⁵ *See* 47 U.S.C. § 309(i)(3)(A). ("The Commission shall establish rules and procedures to ensure that . . . significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications.")

⁶⁶ *See EEO Order*, *supra* note 54, at para. 48 n.91 (reviewing the Commission's *Public Interest Mandate to Promote Programming Diversity*).

⁶⁷ *See* 47 U.S.C. § 309(k).

⁶⁸ *See EEO Order*, *supra* note 54, at para. 2.

The Commission has the additional directive of Section 257.⁶⁹ This rule directs the Commission to identify and eliminate market entry barriers “for entrepreneurs and other small businesses in the provision and ownership of telecommunications services.”⁷⁰ Although this section was implemented with the intent to promote opportunity for entrepreneurs, minorities and other small business owners entering the telecommunications field,⁷¹ it once again shows congressional favor of diverse participants in the communications market. The section also states that in carrying out its congressional mandate, the Commission should seek to promote policies favoring “diversity of media voices” and “vigorous economic competition.”⁷² The practice of advertisers using unfounded and frequently stereotypical generalities as a basis for their marketing plan is an enormous market barrier faced by minority-owned and -formatted radio stations.

Although it might make sense for the FCC to impose restrictions directly on the advertisers themselves, the power of Commission regulation is confined to those whom it licenses or declines to license to broadcast.⁷³ The FCC has a significant opportunity to promulgate a rule under its statutory mandate of promoting and maintaining diverse viewpoints in broadcasting.

Incumbent radio broadcasters wishing to maintain the status quo argue that this type of regulation is an attempt to control the supply and demand of the market.⁷⁴ They argue that advertisers

place a certain value on advertising audiences based on their potential consumer expectations.⁷⁵ These opponents would attribute the discounting and other discriminatory advertising practices to a market determination that the audiences of certain radio stations are not as valuable as other audiences.⁷⁶

B. Considering Anti-Competitive Practices

The Commission is permitted to take antitrust policies into account when making licensing decisions pursuant to the “public interest” requirements of the Act.⁷⁷ This concept of preventing monopolistic powers is essential to promoting diversity in views and voices on the nations airwaves.

Discrimination becomes an anti-competitive practice when a group with the power to reduce competition from others can benefit itself, whether race, gender, religion or industry defines the group.⁷⁸ Discriminatory social groups can be similar to cartels; their actions, which have become industry norms, are “analogous to a price-fixing agreement.”⁷⁹ Thus, the analysis of discriminatory market power reflects aspects of monopoly theory and antitrust law.

U.S. antitrust legislation outlaws cartels and other conspiracies against trade.⁸⁰ The courts have interpreted the law to prohibit certain collusive practices, such as retail price maintenance, through “per se prohibitions” of the actions, regardless of whether collusion in fact occurred.⁸¹

⁶⁹ 47 U.S.C. § 257(a) (2000).

⁷⁰ *Id.* at § 257(a), (b) (stating also that “the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity”).

⁷¹ Congress appears to have mandated these market barrier proceedings to support the Commission’s promotion of the diversity goals in the 1996 Act.

⁷² 47 U.S.C. § 257(b).

⁷³ Additionally, the FCC was determined to have the authority to regulate those who provide facilities for broadcasting. *See generally* *Yankee Network, Inc. v. FCC*, 107 F.2d 212 (D.C. Cir. 1939).

⁷⁴ *See* C. Edwin Baker, *Giving The Audience What It Wants*, 58 OHIO ST. L. J. 311, 387 (1997) [hereinafter Baker].

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See* 15 U.S.C. § 21(a) (1999); *see also* 47 U.S.C § 151. In a regulated industry, anti-competitive behavior is contrary to the public interest. *See In Re* Applications for Renewal of License Filed by United Tel. Co. of Ohio for Radio Common Carrier Stations KZA459 and KQA651 in the Domestic Public Land Mobile Radio Service, *Report and Order*, 26 F.C.C.2d

417, 419 (1970); *see also National Citizens Committee for Broad.*, 436 U.S. at 779 (affirming the Commission’s disallowance of common ownership of a radio or television broadcast station and a daily newspaper located in the same community). More generally, “[d]iversification of control of the media of mass communications” has been viewed by the Commission as “a factor of primary significance” in determining which competitive applicants in a comparative proceeding should receive the initial license for a particular broadcast facility. Policy Statement on Comparative Broadcast Hearings, *Public Notice*, 1 F.C.C.2d 393, 394–395 (1965).

⁷⁸ *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 153 (1994) [hereinafter Cooter].

⁷⁹ *Id.*

⁸⁰ *See* 15 U.S.C. § 1 (2000).

⁸¹ *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). The Supreme Court has stated:

[There] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

These legal prohibitions greatly increase the difficulty of sustaining a cartel. Similarly, U.S. civil rights laws prohibit business practices involving disparate treatment of those persons belonging to protected classes under Title VII of the equal employment laws.⁸² The illegality of conducting certain business transactions with the intent to discriminate greatly increases the difficulties involved in explicit discrimination.

Anti-discrimination laws in some ways are very similar to antitrust laws.⁸³ Similar to anti-competitive practices, the discrimination of advertisers has an affect on minority-formatted broadcasters in that it prevents them from prospering while their counterparts with general format prosper.⁸⁴ Their histories are also similar. For example, in prosecuting unlawful discrimination, initially the government focused on explicit discriminatory practices;⁸⁵ “the plaintiff had to prove the existence of disparate treatment by the employer.”⁸⁶ The law changed, however, in 1971 when the Supreme Court developed the concept of “disparate impact.”⁸⁷ Now a practice can have an illegal disparate impact in the absence of discriminatory intent.⁸⁸ The illegality of the outcome is identified by a pattern suggesting that a protected group has been unreasonably disadvantaged by a business practice. Thus, disparate impact in anti-discrimination law bears a certain resemblance to “monopoly structure” in antitrust law where powerful groups reduce competition.

Market barriers give the FCC authority to prevent discriminatory advertising practices. As discussed, not only do these practices have disparate

impact on market entry, they also significantly impact the livelihood of the broadcaster and the diversity of the airwaves. Because of the existence of these antitrust practices, the FCC has authority to act on them.

C. Judicial Interpretation of the Commission's Authority

In applying this public interest standard, the Commission has been granting licenses based in part on their program proposals. In *FRC v. Nelson Bros. Bond & Mortgage Co.*,⁸⁹ the Court noted that in “view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses.”⁹⁰ In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs. Moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts.⁹¹ In the same vein, the Court in *FCC v. Pottsville Broadcasting Co.*⁹² noted that the statutory standard was a flexible instrument to effect congressional desires “to maintain . . . a grip on the dynamic aspects of radio transmission” and to allay fears that “in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”⁹³

In *Associated Press v. United States*,⁹⁴ the Supreme Court upheld a district court decision that granted summary judgment to prevent members of a press association from acting in restraint of

unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation . . . —an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing.

Northern Pacific R.R. Co. v. United States, 356 U.S. 1, 5 (1958).

⁸² See 42 U.S.C. § 2000e-2(a) (2000).

⁸³ See Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 382 n.26 (1995). More broadly, Ayres suggests that antitrust law could be used to attack discrimination as an “unfair or deceptive trade practice.” Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817,

821 (1991) [hereinafter Ayres].

⁸⁴ See Ayres, *supra* note 83, at 821.

⁸⁵ See Cooter, *supra* note 78, at 155.

⁸⁶ *Id.* (referring to anti-discrimination policy, its history and regulations surrounding it).

⁸⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that Title VII prohibits the use of tests which have a disparate impact, even if the employer has no intent to discriminate, unless the employer can demonstrate that the test is substantially related to the job).

⁸⁸ See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that under the Constitution as opposed to Title VII, unlawful discrimination requires proof of intentional discrimination and not just disparate impact).

⁸⁹ 289 U.S. 266 (1933).

⁹⁰ *Id.* at 279.

⁹¹ See *id.* at 285.

⁹² 309 U.S. 134 (1940).

⁹³ *Id.* at 137-138.

⁹⁴ 326 U.S. 1 (1945).

trade.⁹⁵ The Court stated that the First Amendment was meant to promote the "widest possible dissemination of information from diverse and antagonistic sources."⁹⁶ The Court noted that it would be strange to prevent the government from imposing restraints on the dissemination of information and "afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."⁹⁷

In 1990, the Supreme Court again upheld a public policy of maintaining diversity in broadcasting. The Court held in *Metro Broadcasting, Inc. v. FCC*⁹⁸ that the FCC's policy of promoting minority interests was a valid means of promoting diverse broadcast and a valid exercise of FCC authority.⁹⁹ In addition, the Court held that policies promoting program diversity were an important governmental goal and that it had always been an integral component of the Commission's mission to safeguard that public right.¹⁰⁰

The Supreme Court later overruled their analysis in *Metro Broadcasting*. In 1995, the Court held in *Adarand Constructors, Inc. v. Peña*¹⁰¹ that minority preferences must be analyzed under a "strict scrutiny" standard instead of the "intermediate scrutiny" standard used in *Metro Broadcasting*.¹⁰² *Adarand Constructors*, a nonminority-owned business, lost a U.S. Department of Transportation bid on a highway construction project despite the fact that it qualified for the work and submitted the lowest bid.¹⁰³ The Court held, under its new test, that all race-conscious measures must be narrowly tailored to meet a compelling governmental interest.¹⁰⁴

Additional court scrutiny came three years later in *Lutheran Church v. FCC*¹⁰⁵ when the U.S. Court of Appeals for the District of Columbia applied

the Supreme Court's *Adarand*-based "strict scrutiny" test.¹⁰⁶ The Lutheran Church Missouri Synod ("Lutheran Church") appealed the FCC's decision, which argued the church violated Equal Employment Opportunity ("EEO") regulations through the use of the church's religious hiring preferences and inadequate recruitment of minorities.¹⁰⁷ The court struck down the FCC's EEO broadcast licensing standards on the basis that they were not narrowly tailored and did not meet a compelling governmental interest.¹⁰⁸

Although both *Adarand* and *Lutheran Church* overturned the analysis upheld in *Metro Broadcasting*, neither of these cases preclude the FCC from promoting diversity of broadcasting or diversity of ownership.¹⁰⁹ In fact, the Court in *Adarand* overturned *Metro Broadcasting* only "to the extent it is inconsistent with [their own] holding."¹¹⁰ In other words, if the Court in *Metro Broadcasting* had applied the strict scrutiny standard, the Commission's minority preference policies would still be good law.

The Court in *Adarand* and *Lutheran Church* backed away from the public policy arguments of promoting diversity in the broadcast industry. However, the Court stated in *Adarand* that its decision was not meant to "diminish that aspect of [its] decision in *Metro Broadcasting*."¹¹¹ The circuit court in *Lutheran Church* limited its holding to employment practices, not ownership.¹¹² Furthermore, the court stated that the "recognition of [a] government interest in 'diverse' programming has not been disturbed by the [Supreme] Court," thus binding the circuit court to this Supreme Court precedent.¹¹³

The FCC has acted further on this judicial guidance by promulgating a new broadcast EEO li-

⁹⁵ See *id.* at 20.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 497 U.S. 547 (1990).

⁹⁹ See *id.* at 566.

¹⁰⁰ See *id.* at 554-556.

¹⁰¹ 515 U.S. 200 (1995).

¹⁰² See *id.* at 227.

¹⁰³ See *id.* at 205.

¹⁰⁴ The opinion said:

[W]e hold today that all racial classifications, imposed by whatever . . . government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests. To the extent that *Metro Broad.* is inconsistent with that holding, it is over-ruled.

Id. at 235.

¹⁰⁵ 141 F.3d 344 (D.C. Cir. 1998).

¹⁰⁶ See *id.* at 354.

¹⁰⁷ See *id.* at 356.

¹⁰⁸ See *id.* at 354, 356.

¹⁰⁹ Consequently, *Metro Broad.* was only overturned in the level of analysis applied to the decision. Where the Court noted in *Metro Broad.* that "enhancing broadcast diversity is, at the very least, an important governmental interest," is still good law. *Metro. Broad.*, 497 U.S. at 567-68.

¹¹⁰ *Adarand*, 515 U.S. at 227.

¹¹¹ *Id.* at 258 (referring to the proposition that fostering diversity may "provide sufficient interest to justify such a program" and that their decision is not inconsistent with this proposition).

¹¹² See *Lutheran Church*, 141 F.3d at 355-56.

¹¹³ *Id.*

censing standard.¹¹⁴ The new licensing standard re-establishes the Commission's authority to retain the anti-discrimination provisions of its previous broadcast EEO rule.¹¹⁵ This new rule emphasizes that broadcasters are not merely to refrain from discriminating, but rather they are required to "reach out" in recruiting new employees "beyond the confines of their circle of business."¹¹⁶ Additionally, the *EEO Order* states that persons who discriminate "do not have the basic character qualifications to hold a valuable government license."¹¹⁷ This action clearly states the importance the FCC places on diversity. When viewed in conjunction with other FCC statements, it demonstrates a greater FCC emphasis on promotion of diverse viewpoints and encouragement of minority economic opportunities.

The FCC maintains a compelling interest in promoting diversity within the broadcast industry. None of these decisions preclude the FCC from promoting policies that favor diversity. In fact, the cases seem to support the positions taken by the Commission. Current and future FCC policy should continue to further the public interest of nondiscriminatory decision-making in the broadcast media.

IV. THE MARKET DIFFERENTIAL: BECAUSE OF THE SPECIAL NATURE OF BROADCAST MEDIA AND THE IRRATIONAL AFFECTS OF DISCRIMINATION, GOVERNMENTAL INTERVENTION IS PREFERENTIAL TO NORMAL MARKET INCENTIVES TO ENSURE THE DIVERSITY AND QUALITY OF BROADCAST

¹¹⁴ See generally *EEO Order*, *supra* note 54.

¹¹⁵ See *id.*

¹¹⁶ *Id.* at para. 3.

¹¹⁷ *Id.* at para. 2.

¹¹⁸ See Andrea Adelson, *Minority Voice Fading for Broadcast Owners*, N.Y. TIMES, May 19, 1997, at D9; Matthew S. Scott, *Can Black Radio Survive an Industry Shakeout?*, BLACK ENTERPRISE, June 1993, at 254 [hereinafter Scott].

¹¹⁹ See Scott, *supra* note 118, at 254.

¹²⁰ See Timothy Appell, *Westinghouse to Buy American Radio*, WALL ST. J., Sept. 22, 1997, at A1 (announcing Westinghouse's purchase of American Radio Systems, adding ninety-eight radio stations to their portfolio); Eben Shapiro, *Golden Oldie: A Wave of Buyouts Has Radio Industry Beaming With Success*, WALL ST. J., Sept. 18, 1997, at A1 (noting that since Congress began deregulating the radio industry, it has become one of the hottest markets in media). See also Gloria Tristani, *Keeping the Local in Radio*, Remarks Before the Texas Broad-

A. Favoring Regulation over Market Solutions to Prevent Discrimination

There is a fine line to walk with all regulation—whether and how much government interference should be required must be balanced against the ability of markets to self-regulate. The government must decide whether to impose regulation or allow the media market to determine certain outcomes. Likewise, the government must determine whether specific requirements imposed upon broadcasters are more effective and efficient than general guidelines.

Many minority-owned and -formatted broadcasters attribute their difficulties competing with popular format stations to government efforts to deregulate, claiming that the deregulation intended to help the market actually hinders minority broadcasters.¹¹⁸ These broadcasters argue that efforts to allow the market to determine certain outcomes have made the practice of advertising discrimination more visible by taking away certain market-imposed incentives given to minority licensees that previously evened out the playing field.¹¹⁹ Two specific actions are the consolidation changes imposed by the 1996 Act and the elimination of the minority tax credit.¹²⁰ Both programs once counterbalanced the effects of advertising discrimination. In their absence, minority broadcast stations find it more difficult to compete.¹²¹

In 1993, FCC Commissioner Andrew C. Barrett perceived the potential adverse effects that pro-consolidation would have on minority broadcasters.¹²² He strongly opposed an FCC strategy to allow broadcast industry consolidation.¹²³ The consolidation effort was the FCC's strategy to help the radio industry recoup the large chunk of advertis-

casters Association (Sept. 3, 1998) <www.fcc.gov/speeches/tristani/spgt811.html> (observing that despite a national increase of 4% in the number of stations, the number of radio station owners has decreased by 12% over the past two years; the radio industry also has lost an average of three owners in each of the top ten radio markets and about one owner in each smaller market); Allen S. Hammond, *Measuring the Nexus: The Relationship Between Minority Ownership and Broadcast Diversity After Metro Broad.*, 51 FED. COMM. L. J. 627, 631 (1999) [hereinafter Hammond].

¹²¹ See Hammond, *supra* note 120, at 631–632.

¹²² See National and Local Radio Ownership Rules and FCC's Time Brokerage Rules Modified, *News*, MM Dkt. No. 91-140, Rpt No. DC-2073 (rel. Mar. 12, 1992) (Comm'r Barrett's Dissenting Statement) [hereinafter Comm'r Barrett's Dissent].

¹²³ See *id.*

ing dollars it was losing to cable and network television. Simply put, the order allowed duopoly ownership¹²⁴ and Local Marketing Agreements ("LMAs").¹²⁵ Although a majority of the Commission believed consolidation would help the industry, Commissioner Barrett dissented, arguing that consolidation would hurt black station owners.¹²⁶ He explained that the new regulations encouraged the establishment of regional pockets of radio ownership by a larger company.¹²⁷ The regional networks were attractive to advertisers, thus having a negative impact on singly owned, minority-formatted radio stations. "Consolidation," he said, "makes small independent [minority-formatted] stations harder to sell to advertisers."¹²⁸

The dissent in *Metro Broadcasting* argued that the market controls expression even if a broadcaster might prefer to program differently.¹²⁹ This argument implies that the market will determine what broadcasters air; if there is not a market for something, the broadcasters will not air it. This argument is faulty due to the special nature of the sale of media. Although there may be an audience for the media, that audience does not directly support the livelihood of the media. In fact, there may not be enough advertising dollars to support the media due to discriminatory practices that disrupt natural market forces. Consequently, even if there is an audience, the station might not survive due to the lack of advertising dollars. If no advertiser exists, the station, for market reasons, will not survive.

A number of market applications affect the ability of minorities to compete in the broadcast

field.¹³⁰ Deregulatory policies, the relaxation of multiple ownership and duopoly rules, the elimination of federal tax credits favoring minority owners, as well as the creation of LMAs all affect the ability of minority and majority broadcasters to compete.¹³¹ Referring to the deregulation of the 1996 Act, Debra Lee, President and Chief Operating Officer of BET Holdings, stated that policy-makers are misguided in their belief that "true diversity" will come from more competition in the broadcast market.¹³² Lee contends that the buying power of minority broadcast stations is "dwindling without the edge that the tax credit gave them."¹³³ The "edge" Lee referred to is the market balancing affect of the tax credit given to minority-owned stations. This credit reduced the affects of discriminatory advertising practices by giving minority-owned stations a tax credit.

B. Government Regulation Critique—Too Paternalistic

Economically minded critics of government intervention in the broadcast industry argue that interventions are paternalistic and industry is able to resolve problems on its own.¹³⁴ Setting the tone for deregulation, former FCC Chairman Mark Fowler explained that the government should rely on "normal mechanisms of the marketplace" to decide what the media broadcast.¹³⁵ Fowler claims that media is no different from any other product, and that in the deregulated marketplace "the highest bidder would make the best and highest

¹²⁴ Duopoly ownership is when one company owns up to two AM and two FM stations in the same market. *See id.*

¹²⁵ Local Marketing Agreements ("LMAs") permit a radio or television licensee to "lease" its station to others, which is often another licensee. Because the party leasing the station is not considered a "licensee," the leasing of the new station does not count against them with regard to attribution rates. *See* Gigi B. Sohn & Andrew Jay Schwartzman, *Special Issue On The Sixtieth Anniversary of the Communications Act of 1934: Essay: Broadcast Licensees and Localism: At Home in the "Communications Revolution,"* 47 FED. COMM. L. J. 383 (1994).

¹²⁶ *See* Comm'r Barrett's Dissent, *supra* note 122. *See also* Scott, *supra* note 118, at 254.

¹²⁷ *See* Scott, *supra* note 118, at 254.

¹²⁸ Comm'r Barrett's Dissent, *supra* note 122.

¹²⁹ *See Metro Broad.*, 497 U.S. at 619 (O'Connor, J., dissenting) (referring to the FCC's focus on ownership being a nexus to programming: "the market shapes programming to a tremendous extent. Members of minority groups who own licenses might be thought, like other owners, to seek broadcast programs that will attract and retain audiences").

¹³⁰ *See* Hammond, *supra* note 120, at 631.

¹³¹ *See id.* at 632. *See also* Gloria Tristani, *Keeping the Local in Radio*, Remarks Before the Texas Broadcasters Association (Sept. 3, 1998) <www.fcc.gov/speeches/tristani/spgt811.html>.

¹³² *See* Matt Pottinger, *BET President Says Telecom Act Damaging Minority Ownership Prospects*, ST. NEWS SVC., Jan. 16, 1997.

¹³³ *Id.* It is important to note that minority-owned stations have a very high correlation with minority-formatted radio stations. Thus the market barriers presented to minority ownership interests have an impact on the broadcast of minority formats. *See Metro Broad.*, 497 U.S. at 555-56 (upholding the FCC's finding that minority preferences were justified as a means of increasing diversity of broadcast viewpoint).

¹³⁴ *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719, 1725 (1995).

¹³⁵ Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210 (1982).

use of the resource."¹³⁶

In 1984, the Commission issued an order where it determined that market incentives ensured broadcast programming was responsive to community needs.¹³⁷ The *Program Order* stated that market forces "provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities."¹³⁸ In this action, the Commission "deregulated" the programming requirements of broadcasters that previously limited them to no more than twelve commercial announcements per hour.¹³⁹ In that same order, however, the Commission retained the right to review these policies,¹⁴⁰ thereby not relinquishing their authority, but recognizing the opportunity for market influences to affect the broadcasters' programming decisions. By retaining their right to review, the Commission asserted their ability to review programming of broadcasters and the market influences on that programming in the future.

This deregulatory tone has carried over into much of the policy-making forums that affect the regulation of broadcasting. The 1996 Act was adopted as "an Act to promote competition and reduce regulation."¹⁴¹ This pro-market refrain might also receive support from those generally pro-regulatory liberals because of First Amendment concerns that reject government paternalism with regard to freedom of speech.¹⁴² The First Amendment, however, restricts the intentional suppression of speech; market interventions designed to improve the quality and diversity of the press are not restricted by the First Amendment. Rather, First Amendment principles support the Commission's authority surrounding the diversity

of broadcast.¹⁴³

The standard model of economics is somewhat oversimplified when applied to broadcast in the United States.¹⁴⁴ Under general economic theory, the market produces a "preference-maximizing" amount of the product.¹⁴⁵ The demand for the product drives production as long as the consumer is willing to pay more than the product's cost (cost of production), that is, as long as the marginal price exceeds the marginal cost.¹⁴⁶ Even if this is true with respect to can openers and groceries, this theory is not applicable to the sale of media or any other consumer good where prejudice and bias replace rational market factors.¹⁴⁷

Unlike can openers and groceries, radio broadcasts have a "public good" aspect, in that the use of the product by one individual does not necessarily affect the use of the product by another.¹⁴⁸ Thus, the marginal cost is difficult to determine when there exists a "consumer" who does not pay for the product. Secondly, the extent of externalities (costs imposed on the seller/purchaser that are not accounted for in the purchase price) are significant in broadcast media. Broadcasts can advance or ruin reputations, determine the amount of news one knows or rouse an angry mob. Similarly, many people value a well-functioning democracy and hence are greatly benefited by other people's consumption of quality, diverse media; these same people are harmed by ignorance and apathy produced by misleading, inadequate or nondiverse media. Finally, media products are different than most consumer products because two purchasers pay for the transaction; broadcasters sell audiences to advertisers and advertisers sell

¹³⁶ *Id.* at 211. See Baker, *supra* note 74, at 313.

¹³⁷ See generally *In Re The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 F.C.C.2d 1076 (1984) [hereinafter *Program Order*].

¹³⁸ *Id.* at para. 2.

¹³⁹ See *id.* (citing to Amendments to Delegation of Authority, *Order*, 43 F.C.C.2d 638, 640 (1973); Amendments to Delegations of Authority, *Order*, 59 F.C.C.2d 491, 493 (1976)).

¹⁴⁰ See *id.* at para. 3 n.2 (stating that these programming obligations are properly subject to review and revision in the future).

¹⁴¹ The Telecommunications Act of 1996, *Introductory Descriptive Statement*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at scattered sections of 47 U.S.C.).

¹⁴² See Baker, *supra* note 74, at 314.

¹⁴³ The First Amendment, in fact, preserves diverse viewpoints. See Statement Policy on Minority Ownership, *Public Notice*, 68 F.C.C.2d 979, 981 (1978) [hereinafter *Minority Ownership Policy*].

¹⁴⁴ See Baker, *supra* note 74 at 315. (explaining why the "Standard Model" is an inaccurate depiction of the media market, and ultimately why regulatory oversight maintains the integrity of the public airwaves).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* (stating that the "Standard Model" is based on the following premises: 1) that products are sold in competitive markets; 2) that production and normal use produces few externalities (i.e., few major benefits not captured by or costs not imposed on the seller/producer); and 3) that the most significant policy concern is satisfying market-expressed preferences).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

products to audiences.¹⁴⁹ With these multiple purchasers comes the potential for conflicting interests in media content.¹⁵⁰ In situations where market-pricing mechanisms cannot be relied upon for efficiency or equity, the government should intervene.¹⁵¹

V. OFFERING A SOLUTION

THE COMMISSION SHOULD ACT ON ITS AUTHORITY BY REVISITING THE RECOMMENDATIONS LAID OUT BY THE CIVIL RIGHTS FORUM AND HOLDING BROADCASTERS RESPONSIBLE FOR NOT ENGAGING IN BUSINESS WITH DISCRIMINATORY ADVERTISERS.

A. Revisiting the Recommendations of the *Minority Broadcast Advertising Study*

The Civil Rights Forum ("CRF") made several recommendations to the Commission when they issued their report on advertising discrimination last year.¹⁵² Among the recommendations, CRF suggested that the Commission conduct further research to evaluate advertising business practices in order to more narrowly define those business practices that may not be justifiable in terms of nondiscriminatory marketing objectives.¹⁵³ Further research is appropriate to determine whether advertising discrimination is an issue within the television broadcast markets as well.¹⁵⁴ The CRF also recommended that the FCC take the lead, initiating a joint task force with the Federal Trade Commission for the purpose of adopting a policy statement on acceptable advertising practices.¹⁵⁵

At this time, however, the Commission has ne-

glected to take the recommended action. The effects of advertising discrimination have an overwhelming influence on the FCC's role of promoting diverse broadcasting. A code of conduct should be established to require that advertising purchasing decisions are based upon market research and not by flawed stereotypical buying assumptions.¹⁵⁶ "No Urban/Spanish dictates" and "minority discounts" should be strictly prohibited without a bona fide product exemption.¹⁵⁷

Broadcasters should be required to disclose whether their market research used in coordination with sales promotion has been prepared by a service that is accredited by the Media Rating Council ("MRC").¹⁵⁸ Where nonaccredited market research services are used, the broadcasters should be required by the FCC to show cause why they do not use an accredited service. Minor variations in market research can cause significant differences in market research results. A practice known as audience "undercounting" is an effect that the study suggests may account for some of the discriminatory actions. Here, minority audiences are either not totaled or accounted for correctly.¹⁵⁹ The concept is that an industry standard, whereby participants can decide what those industry standards are, will help put all broadcasters and advertising organizations on an even playing field and eliminate potentially conflicting data.

Finally, the FCC should initiate an executive order that prohibits federal agencies from contracting with advertising agencies that practice discriminatory advertising actions¹⁶⁰ or that other-

¹⁴⁹ See *id.* at 320 (citing to his other works on this topic: C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* ch. 2 (1994)).

¹⁵⁰ See *id.*

¹⁵¹ See Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 *LAW & CONTEMP. PROBS.* 505, 518 n.34 (1969).

¹⁵² See *The Minority Broadcast Advertising Study*, *supra* note 2, at 18-21.

¹⁵³ See *id.* at 18.

¹⁵⁴ See *id.* (noting that the data with regard to television advertisements was inconclusive due to the special nature of television, and the fact that 1) television programming is not targeted through the course of a day the same way radio is (with the large exception of Spanish-language television); and 2) a large representation of black owned stations were Home Shopping Network affiliates, which ran advertisements 24 hours a day).

¹⁵⁵ See *id.* at 19.

¹⁵⁶ See *id.* at 19-20.

¹⁵⁷ This concept of bona fide product exemption is ex-

plained further below, but note that it serves as a rebuttable presumption and exempts an advertiser of the requirement if it can prove that the product should be exempted because of the nature of the product and the demographics of that group.

¹⁵⁸ MRC is a nonprofit media industry association with the purpose of maintaining audience research confidence and credibility. They serve to ensure that audience measurement services are valid, reliable and effective. By reviewing all methodological aspects of the organization's service, MRC evaluates audience research to ensure that it is accurate. All MRC organizations are audited regularly and expected to contribute to the improvement of research quality in the marketplace. See Media Rating Council, Inc., *Organizational By-Laws, Mission Statement and Information Paper* (Feb. 24, 2000) (unpublished, on file with Media Rating Council, Inc.). See also *The Minority Broadcast Advertising Study*, *supra* note 2, at iv.

¹⁵⁹ See *The Minority Broadcast Advertising Study*, *supra* note 2, at 19.

¹⁶⁰ This would be similar to that imposed on broadcast

wise fail to comply with the policy statement of the joint task force. This policy should follow the code of conduct outlined for industry, requiring that neither the federal government nor a contracting agent for the federal government engage in any business with discriminatory advertising agencies.¹⁶¹

B. Broadcast Licensing Qualification

The Commission has served to ensure diversity of ownership in broadcasting. The problem of discrimination arises once minority broadcasters compete for advertising dollars and are faced with a discriminatory marketplace. If a minority broadcast station cannot maintain adequate sponsorship, it will not be able to expand and develop; it will not be able to afford to hire the industry's best and brightest; and it ultimately will not be able to compete with other broadcasters on an equal footing.¹⁶²

The Commission has a mandate from Congress to ensure the diversity of the airwaves.¹⁶³ They have conducted studies, held forums and encouraged the industry to eliminate the problem on their own. The Commission has recognized this issue for more than twenty years when it observed that the views of minorities were underrepresented in broadcast media.¹⁶⁴ The Commission's interest in this matter is evident. Delay in the further development of FCC policy will undoubtedly result in the intensification of the problem. The Commission must seek to eliminate advertising discrimination. This comment proposes that the Commission only license those broadcast-

ers who affirm that they do not engage in any business with advertisers who participate in discriminatory practices.

Such action will ensure that all broadcasters police the marketplace. With the status of their applications pending, broadcasters have a great deal to lose if found conducting business with discriminatory advertisers. This then becomes a qualification factor for broadcasters when applying for, or seeking renewal of, broadcast licenses.

With this new policy, advertisers will have much more to lose by practicing discriminatory advertising. If they are found to be discriminating; they will not be able to advertise through broadcast media until they remedy their discriminatory advertising practices or provide an affirmative defense for their actions. Broadcasters will require advertisers to sign a statement that they do not and will not engage in discriminatory advertising practices. If broadcasters have reason to believe that an advertiser whom they engage in business with is practicing discriminatory advertising, in order to protect their license, they will either require the advertiser to remedy their actions or extinguish business with the advertiser altogether.

Advertisers should, however, be allowed a bona fide product qualification (similar to bona fide occupational qualification) as an affirmative defense to any allegations of discriminatory marketing practices.¹⁶⁵ For example, bronzing lotion manufacturers will not be required to advertise their products on minority-formatted media. Similarly, the producers of black hair care products should not be required to advertise on popular-formatted

licensees. *See id.* at 19–20.

¹⁶¹ *See id.*

¹⁶² *See id.* at 22 (citing telephone interview with Tom Castro, Chairman and President of El Dorado Communications, where he states the frustration of minority broadcast stations trying to compete with larger stations:

(1) [b]ecause of the discounts, sometimes you can't compete and keep your best people. And that leads to a . . . drain. We do the hard work of training them, and then they go off and work for these larger companies . . . ; (2) Our profits are less. If our profits are fewer, then when it comes time to buy the station that comes up for sale in a given city where we are competing [with larger stations], they're going to be able to outbid us for those properties because of the profits that they have built up over time. And so that means they have yet another scarce frequency that they control, and we are losing the opportunity to build wealth for ourselves. (3) The quality of our programming, while good, would be better if we had more profits. If we had more profits we

could invest that back into our business. So, it's harder to remain competitive, and it's harder to promote your format to the public . . . It's a vicious cycle.

Id.

¹⁶³ *See* 47 U.S.C. §§ 151, 309.

¹⁶⁴ *See Minority Ownership Policy, supra* note 143 (stating that although efforts have been made to correct the problems of diversity in broadcasting, "[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media").

¹⁶⁵ In the area of Title VII law known as "bona fide occupational qualification" ("BFOQ"), in which certain forms of overt discrimination based on sex or national origin can be justified, the Court has held that the test is whether the proposed BFOQ relates "to the 'essence' . . . or to the 'central mission of the employer's business.'" *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); *Western Airlines v. Criswell*, 472 U.S. 400, 413 (1985)).

radio stations if their product is aimed directly toward certain population segments.

VI. CONCLUSION

Out of concern for a lively democracy and the spirit of a marketplace of free ideas, the Commission must preserve the diversity of radio airwaves and the communities implicit within that diversity.

The issues discussed in this comment ultimately affect the quality of programming made available to the listening public. To the extent advertising practices affect competition, broadcasters are less capable of providing a diverse range of viewpoints and a plethora of high quality programming choices. Congress, the courts¹⁶⁶ and the FCC¹⁶⁷ have each repeatedly expressed concern that diversity of viewpoints must be reflected in the broadcast media. Indeed the Commission's study was based on congressional policy "favoring diversity of media voices [and] vigorous economic competition."¹⁶⁸

The Commission has pursued numerous initiatives in an attempt to diversify public broadcasting and enhance media quality. Indeed, the Commission identified "diversification of control of the media of mass communications" as "a factor of primary significance" in its competitive licensing processes, and has adopted diversity and minority "preferences" in other selection processes.¹⁶⁹ The Commission has also adopted equal opportunity rules designed to foster opportunities for minorities and women in the broadcast field. These Commission initiatives are designed to promote diversity of participation in the broadcast field.

The Commission holds that diversity of ownership and employment in the broadcast industry will promote diversity of broadcast material.¹⁷⁰

U.S. citizens deserve access to diverse opinions and public affairs information that directly affect their communities and families. It is not the right of advertisers to choose what voice is to be heard. The FCC therefore must ensure that all voices have an equal right to be heard.

Current government inaction may be a result of the inability to develop a comprehensive plan that will eliminate the problem entirely. In fact, there may be no way to completely eradicate something that is as arbitrary as racial discrimination. The actions recommended by this paper, however, should significantly reduce the impact of discrimination in the broadcast industry by increasing the standard that advertisers and broadcasters are expected to uphold. If an advertiser continues to practice discriminatory behavior after the implementation of Commission discrimination policies, this will be a significant detriment to the advertiser as well as those broadcasters who choose to engage in business with that advertiser.

Advertisers should not be commanded to purchase airtime on less qualified radio stations simply because of the minority broadcast populations. Far from disparaging real qualifications to advertise products, advertisers should be required to select media with real qualifications serving as controlling factors, so that race becomes irrelevant. By ensuring that advertisers base their marketing decisions on real marketing qualifications, the Commission will thereby serve to ensure that the diversity of voices in media is heard. Chair-

¹⁶⁶ See *Associated Press v. United States*, 326 U.S. 1, 20 (1943) ("[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."). See also *Metro Broad.*, 497 U.S. at 568. In *Metro Broad.*, the Court commented, "diversity of views and information on the airwaves serves important First Amendment values . . . The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits rebound to all members of the viewing and listening audience." *Id.*

¹⁶⁷ See *Minority Ownership Policy*, *supra* note 143 ("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.").

¹⁶⁸ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996), 47 U.S.C. § 257(a), (b) ("identi-

fying and eliminating . . . market barriers . . . the Commission shall seek to promote the policies of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity").

¹⁶⁹ *In Re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, *Report and Order*, 11 FCC Rcd. 19,341 (1996) (explaining the Commission's reasoning for actions on both accounts).

¹⁷⁰ See *In Re Amendment of Sections 3.35, 3.240 and 3.638 of the Rules and Regulations Relating to the Multiple Ownership of AM FM and Television Broadcasting Stations*, *Report and Order*, 18 F.C.C. 288, at 292-93 (1953) (stating that the fundamental purpose of its new national ownership rules was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest").

man Kennard and Commissioner Tristani recently commented:

[T]he issue is whether we will ensure that the mass media reflect all of society for the benefit of all of society. We believe that these principles are the bedrock of our democratic system of government and our way of life as a free and inclusive society.¹⁷¹

The efforts to eliminate advertising discrimination will ensure that diversity of programming prospers. The Commission has determined that discrimination exists. Now it should act on that knowledge.

¹⁷¹ *In Re* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, *Notice of Proposed Rulemaking*, 13 FCC Rcd. 23,004 (1998) (Joint

Statement of William E. Kennard & Gloria Tristani) (relating to the context of EEO requirements intended to promote programming diversity).

