

[US] Minority Ownership on the Federal Communications Commission's Agenda

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After decades of declining minority ownership, the US government is once again interested in promoting it. On 15 January 2009 the Federal Communication Commission's ("FCC" or "Commission") Media Bureau announced a "Minority Media Ownership Workshop" to be held on 27 January 2010, as part of the Commission's 2010 quadrennial review process. The Workshop will include two panels: "Constitutional Issues in Advancing Minority Ownership Through the FCC's Media Ownership Rules" and "How the FCC's Media Ownership Rules Affect Minority and Female Ownership" by examining some of the following: (1) the interaction of the FCC's media ownership rules and minority or female ownership (including the potential impact of any rule changes on such ownership); (2) marketplace or other factors that encourage diverse entrants; and (3) the constitutionality of targeted "race-based" measures for promoting diverse ownership.

The Commission's basic statutory authorization to promote such diversity derives from the Communications Act of 1934, as amended by the Telecom Act of 1996 ("Telecom Act") which provides for two mechanisms of promoting minority ownership using the FCC's license granting authority: §309(i) ("Random Selection") and §309(j) ("Competitive Bidding").

§309(i)(3)(A) provides that the FCC shall establish rules and procedures to ensure that (1) a "significant preference" is given to applicants or groups of applicants who will increase the diversification of ownership of the media of mass communications; and (2) to diversify further the ownership of the media, an additional "significant preference" is given to any applicant controlled by a member or members of "minority group" (defined to include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders").

§309(j)(3)(B) gives the FCC the authority to design a system of competitive bidding' which will include safeguards to protect the public interest in the use of the spectrum and seek to promote, among other purposes, economic opportunity and competition by avoiding excessive concentration of licenses by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."

In its 1990 *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 decision the US Supreme Court used the “intermediate” review standard to find such “pluses”, when used in favor of women and minorities, to be Constitutional. However, in 1995 the Court, in *Adarand Constructors, Inc. v. Penna*, 515 U.S. 200 rejected such two-tiered systems, and directed agencies to first look to “race-neutral” alternatives before giving racial preferences, in effect overturning *Metro Broadcasting*. The workshop will examine the impact of subsequent decisions on the “Adarand” standard.

It remains to be seen if any further effort will be undertaken by the Commission to increase the proportion of minority or woman owners, and whether such efforts will be successful in the face of further media consolidation. The Workshop at least appears to signal that minority ownership issues are once again on the Commission’s radar.

Communications Act of 1934, as amended by the Telecom Act of 1996 (“Telecom Act”)

<http://www.fcc.gov/Reports/1934new.pdf>

