



August 2008

Increased Efforts To Increase Diversity

Ron Whitworth
703-812-0478
whitworth@fhhlaw.com

The juggernaut which led to the Commission's spate of diversity initiatives (*see* the March, 2008, *Memo to Clients* and the related article on page 1 of this issue) continues unabated, and may even be expanding. Recent developments reflect a continuing focus on issues relating to the socio-ethno-economic profile of the "media".

For example, instead of its usual monthly meeting at its DC headquarters, in July the Commission headed up 95 to the Big Apple, where it convened a confab of industry and government representatives to address the issue of access by women and minorities to the purchase of communications entities. The goal was to "enhance the [FCC's] knowledge", explore the topic and, possibly, identify ways to facilitate access of women/minorities to communications properties in the age of consolidation.

The emphasis on women and minorities was particularly interesting because, in the diversification initiative order adopted last November, the Commission had taken pains to speak in terms of "eligible entities", a gender- and race-neutral concept which avoids the constitutional problems which arise when the government engages in gender- or race-based decisionmaking. But since the New York session was mainly a forum for the gathering and dispensing of information, the temporary abandonment of the constitutionally convenient cant was probably not problematic.

Elsewhere on the diversification front, Media Access Project (MAP) has proposed that the Commission introduce a new class of television license that would apply not to a primary, stand-alone, station, but rather to the separate, individual digital multicast streams which will be possible through DTV operation. From press reports describing the proposal, it appears that MAP would have the Commission issue separate licenses for each digital stream that a TV licensee would be willing to make available. The separate channels so licensed would be deemed "S Class" licenses. They would be made available, through an auction mechanism, to minorities, women and "others underrepresented in media ownership". The primary TV licensee would be compensated for use of its facilities, since the S Class licensee would obviously be using the primary station's transmission facilities.

The upside of this proposal, from the “diversity” perspective, is that it would make available over-the-air video channels to new entrants to the television business. Since (according to the proposal) S Class stations would be entitled to must carry rights, S Class licensees would enjoy the ability to reach the same audience – over-the-air and through MVPD delivery systems – as conventional full-service licensees.

But S Classers would be subject to public interest obligations, and could devote no more than 50% of their broadcast day to “commercial matter”. That latter limitation would appear to lessen the desirability of the proposed S Class – essentially relegating S Class licensees to a kind of second class status. (That is ironic, since the S Class proposal was apparently intended as a counter to a proposal by Chairman Martin which would have permitted leasing of digital streams to “small and distressed businesses”. According to critics, Martin’s proposal amounted to a form of “media sharecropping”.)

On yet another front, as we have reported here previously, the Commission is requiring, as part of its diversification initiative, that each broadcaster certify in its next license renewal application that: (a) the broadcaster’s advertising contracts do not discriminate on the basis of race or gender; and (b) such contracts contain nondiscrimination clauses. Now another public interest group has suggested that the Commission designate, from the Commission’s staff, an “advertising nondiscrimination compliance officer” (ANCO). According to the suggestion, the ANCO would be responsible for alerting broadcasters to their obligation to place nondiscrimination clauses in their advertising sales contracts, and their duty to observe and insist on performance of these clauses just as they would with any other material term of an advertising contract.

Since all broadcasters will be reminded of these obligations come renewal time, it is difficult to see why the Commission should allocate any of its personnel resources to this particular task. But, given the extent to which the Commission has thus far seemed eager to embrace virtually any diversity-related brainstorm, we should not be surprised if this one gains traction, too.