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## **New Ownership Reporting Rules Adopted As Commissioners Seek “Diversity”**

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In an ambitious action that signals the re-awakening of race- and gender-based government regulation of broadcast ownership, the Commission has re-vamped its rules and related forms for reporting the ownership of commercial broadcast stations. That means *all* commercial broadcast stations – not only full-service radio and TV’s, but also LPTV and Class A stations previously exempt from ownership reporting. And noncommercial (NCE) stations did not escape the FCC’s critical gaze: the Commission has proposed changes in the way “ownership” of those stations is reported as well.

While the full text of the FCC’s action has not yet been released, the Public Notice discloses at least the following changes:

- All ownership reports for commercial licensees will now be filed by a single filing deadline – November 1 – and will reflect data as of October 1. This abandons the longstanding policy requiring the “staggered” filing of ownership reports on the anniversary of the reporting stations’ respective renewal application deadlines.
- All commercial licensees will be required to file ownership reports. This means that LPTV, Class A, single individuals and partnerships composed exclusively of individuals – all groups previously exempted from ownership reporting requirements – are now subject to the requirement.
- Certain less-than-controlling interests previously deemed unreportable will now be required to be included.
- The Media Bureau is now authorized to perform random audits “to ensure the accuracy of reports”.

On the NCE side, the Commission has proposed that NCE licensees be compelled to include “gender and racial/ethnic” information in their ownership reports. Additionally, LPFM licensees, historically exempt from ownership reporting, would lose that

exemption. Recognizing that many NCE stations are licensed to non-profit, non-stock organizations that don't entail the conventional notion of "ownership", the Commission acknowledges that it will have to come up with a workable definition of "ownership" in the NCE context.

The Commission's goal underlying these changes is clear: the agency wants to "be able to more accurately assess and effectively promote diversity of ownership in the broadcast industry." According to Acting Chairman Copps, the state of broadcast ownership is "shameful" because the media "are still deficient when it comes to reflecting the diversity of America." And that "shameful state of affairs" will "continue until more women and minorities actually own stations and set their own policies." His sentiments were echoed by Commissioner Adelstein. In a considerably more restrained statement, Commissioner McDowell expressed cautious support for the concept of obtaining "more precise and reliable" ownership statistics while making clear that he did "not entirely agree with every word" in the Commission's order.

The push for increased racial/ethnic/gender "diversity" in broadcast ownership re-opens multiple cans of worms that have been largely untouched for 15-20 years.

In the late 1970s, the Commission – in language remarkably similar to that of Copps and Adelstein – expressed concern about the "underrepresentation" of women and minorities in the ranks of broadcast owners. A number of policies were adopted to spur increases minority/female ownership. The efficacy of those policies was, however, questioned and questionable. Entities claiming to be owned or controlled by "minorities" or females often turned out, upon closer inspection, to be shams created by people who would not themselves have been eligible. And even when legitimately qualified entities obtained broadcast authorizations, the FCC did not – and probably could not – compel them to retain those authorizations in perpetuity: once a "minority" or female got a station, nothing stopped that person from selling it. So unless the Commission were prepared to restrict the alienability of particular licenses – *i.e.*, defining them somehow as "minority" or "female" licenses which could not be owned by non-minority men – the best the Commission could hope for would be to facilitate the entry, but not the permanent installation, of some "minorities" and women into broadcast ownership.

The issue of race-based (and, secondarily, gender-based) governmental decision-making is among the most constitutionally sensitive issues imaginable. As a general rule, the Constitution forbids the government from discriminating among citizens on the basis of race – a principle established with inspirational clarity in *Brown v. Board of Education*. In his presentation to the Supreme Court on behalf of the petitioners in that case, Thurgood Marshall (then still in private practice) argued that "race is a constitutional irrelevancy". In other words, the Constitution dictates that, in the design

and implementation of its policies, the government must be color-blind. Any regulatory scheme that demands racial/ethnic information (such as the new ownership reporting requirements) – and especially any regulatory scheme that would limit governmental approvals based, at least in part, on the racial/ethnic composition of applicants (as Copps’s statement suggests he, at least, has in mind) – must be approached with the utmost caution.

If the Commission is going to adopt some race/ethnic/gender-based system of regulation of broadcast ownership, it will have to confront thorny issues, from the practical to the conceptual. Practically speaking, for example, how is the term “minority” (or whatever other equivalent qualifying terms the Commission may use) to be defined? This has never been an idle question, and as the number of multi-racial individuals in our society increases, it will become increasingly difficult to answer. And while some may justify race-based regulation as necessary to address a perceived problem of “underrepresentation”, what exactly does “underrepresentation” mean? If the government is setting out to eliminate “underrepresentation”, how will the government know that its job has been completed?

Conceptually, the Commission will have to look long and hard at the concept of “diversity” which, according to Copps and Adelstein (and other proponents of race/ethnic/gender-based regulations), is a matter of urgent concern. What do they mean by “diversity”? How is it defined? How can a governmental agency identify it? How can a governmental agency determine what level of “diversity” is “enough”? And, perhaps most importantly, how does that governmental agency propose to monitor and maintain the level of “diversity” which it believes desirable?

An obvious potential problem here is that regulation in the name of “diversity” is likely to immerse the Commission ultimately in content regulation. And that raises a whole separate universe of constitutional questions involving the First Amendment.

Two decades ago, a Jonathan Swift-like “modest proposal” was advanced. If the Commission really wants to assure “diversity” without running afoul of *any* constitutional questions, it can do so easily. All it has to do is to limit to one, and one only, the number of broadcast licenses that any individual can hold an interest in, directly or through any type of business organization or relationship. One station – no more, no less. By doing that, the Commission would automatically and irrefutably achieve the goal of absolutely maximizing broadcast diversity, and without having to address and resolve any thorny constitutional questions.

The Commission is not likely to adopt that approach. But at some point it should consider why any alternative it might propose is preferable to that approach.

One other potentially important consideration: the Commission that adopted the new ownership reporting requirement is most certainly not the Commission that will be in place several years from now. The current Commission consists of only three individuals, one of whom (Adelstein) is already on his way out the door. With three new members yet to take their seats (and possibly more), it's very hard to say with any confidence where this journey will finally lead.

So strap yourselves in for an interesting ride over the next couple of years.