Are Minority Preferences Necessary?
Another Look at the Radio Broadcasting Industry

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The fate of minority preference programs is one of the major civil rights policy questions that will be determined in the 1990s. The merits of these minority preference programs have become increasingly controversial; debate has raged in the media, in the legislatures, and in the courts. Proponents claim that these policies are responsible for tremendous progress in minority employment and business ownership and therefore are necessary to reverse entrenched patterns of racial discrimination that the marketplace has failed to ameliorate. Critics argue that the programs are overbroad and superfluous since there is no evidence of specific discrimination.

1. See e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (whenever a policy uses racial classifications, regardless of its benign intent, strict scrutiny is required); Fullilove v. Klutznick, 448 U.S. 448 (1980) (where the Court upheld a set-aside policy created by Congress which was of limited duration, flexible, and did not impose an undue burden on innocent third parties); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (where the Court held that a program which gave priority to minority teachers during lay-offs was unconstitutional because it did not remedy specific discrimination) and City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989) (where the Court held that a city policy requiring a 30 percent set-aside for minority subcontractors was unconstitutional since it was not narrowly tailored to address any discriminatory violation).

2. Telephone interview with James L. Winston, Executive Director and General Counsel of the National Association of Black Owned Broadcasters, Inc. [hereinafter NA-BOB] (April 24, 1989) (indicating that many of his members have been able to acquire broadcasting properties as a result of the Federal Communications Commission’s [hereinafter FCC] minority preference programs).
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They add that the programs benefit only "rich minorities," and result in sham transactions. Consequently, these critics contend that the programs are ineffective.

Some of the preference programs were developed in the late 1960s in response to the Kerner Commission report, which recommended policies to encourage greater employment and business development for minority groups historically left out of the economic mainstream. This led to a number of new programs that either set aside opportunities or assigned a "plus factor" to minorities. For example, noting the Kerner Commission's criticism of the media for failing to cover or accurately portray the African-American community, the FCC initially responded by developing "race neutral" policies to encourage minority employment and to require broadcasters to ascertain the needs of various community groups to ensure that diverse views would be broadcast. However, as both the courts and the Commission came to realize, neither the equal employment opportunity ("EEO") nor the ascertainment policies were solving the problem of minority underrepresentation. Consequently, the FCC

3. For example, in the broadcasting industry, when minorities, with little or no equity investment and with no intention of staying in broadcasting, purport to control an interracial group which acquires a broadcasting station using a minority preference, the transaction is commonly called a sham. See infra p. 410.

4. Rudnitsky, How the Rich Get Richer, FORBES, May 15, 1989, at 38 (claiming that tax certificates, one of the FCC's minority preference programs, have done little more than enrich already rich corporations or wealthy minorities at the expense of taxpayers).

5. When widespread urban rioting occurred throughout the United States during 1967, President Johnson appointed the National Advisory Commission on Civil Disorders (the "Kerner Commission") to analyze the reasons for the disturbances and to make recommendations to prevent their reoccurrence. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 3 (1968) [hereinafter KERNER REPORT].


7. KERNER REPORT, supra note 5, at 10. The Commission recommended that there be expanded coverage of the African-American community through "better links" and the increased integration of African-Americans in all aspects of the industry.

8. While certainly the KERNER REPORT was a major catalyst in the development of the FCC's policies, another factor was the increased activism of civil rights groups which brought suits and initiated other legal actions demanding that broadcasters be more representative of minorities. See Honig, The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How. L.J. 854, 864 (1984) (indicating that litigation and protest by citizen advocacy groups influenced the development of the FCC's EEO policies which caused an increase in minority employment in the broadcasting industry). By "race neutral" I mean policies that do not allocate preferences based on racial classifications.

9. In both 1977 and 1979, the United States Commission on Civil Rights released studies which documented the serious underrepresentation and stereotyping of women and minorities on prime time television. See UNITED STATES COMMISSION ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION (1977)
began developing minority preference policies to encourage minority ownership by awarding "qualitative enhancements" for minority ownership in comparative licensing hearings;\(^{10}\) issuing tax certificates that permit the seller of a broadcast facility to defer capital gains taxation when selling to minority-owned or controlled groups;\(^{11}\) and permitting licensees designated for a revocation hearing to sell their licenses to a minority-controlled group at a distress sale price, which can be no more than 75% of the fair market value.\(^{12}\)

The FCC's minority preference programs have faced numerous constitutional challenges in the courts.\(^{13}\) Challengers have claimed that the minority preference policies are unconstitutional because: (1) there is no evidence of racial discrimination in the broadcasting

\(^{10}\) TV9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), established the precedent for awarding a qualitative enhancement for minority ownership on the grounds that such ownership was likely to lead to greater programming diversity. The awarding of a qualitative enhancement for minority ownership is not determinative of the award of a license. Qualitative enhancements are considered only if no applicant has a clear quantitative advantage or prevails under Section 307(b) of the Communications Act. See Winter Park Communications v. FCC, 873 F.2d 347, 353-54, (D.C. Cir. 1989), cert. granted sub nom. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 715-54 (1990). For a fuller discussion of the minority qualitative enhancement, see infra p. 387.


\(^{13}\) On June 27, 1990 the Supreme Court held that these policies are constitutional. Ruling 5-4 in Metro Broadcasting v. FCC, ___ S.Ct. ___, (1990 WL 85519), the Court said that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible." Prior to that, courts sent mixed signals on the issue. See, e.g., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985) (affirming minority enhancement as a rational means of encouraging minority ownership which would result in more diverse viewpoints); Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985) (the FCC's preference for female ownership was held unconstitutional since it bore no rational relationship to the accomplishment of program diversity); Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989), cert. granted sub nom., Astroline Communications Co. v. Shurberg Broadcasting of Hartford Inc., 110 S. Ct. 715 (1990) (FCC's minority preference in distress sales held to be unconstitutional since it was not narrowly tailored enough to meet the objective of either remedying past discrimination or promoting program diversity); Winter Park Communications Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989) cert. granted sub nom. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 715 (1990) (court upheld the minority preference in comparative hearings since it was "but one factor in a competitive multifactor selection system that is designed to obtain a diverse mix of broadcasters").

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industry; 14 (2) programming diversity is not clearly a compelling government interest which justifies the use of racial classifications; 15 (3) there is no proven nexus between program diversity and minority ownership; 16 (4) the policies are not narrowly tailored and have not resulted in greater minority ownership; 17 and (5) the policies violate the equal protection rights of non-minorities. 18 Studies that clarify these policy issues are particularly important today since one of the lingering impacts of the Reagan Administration has been the assumption that the marketplace, rather than affirmative government policies, provides the most effective means of placing minorities in the economic mainstream. 19 Moreover, courts, when analyzing the constitutionality of minority preference or set-aside programs, have indicated that there is a lack of data justifying that these policies are needed. 20

Since most commentators have focused on constitutional issues when analyzing the FCC's minority preference programs, 21 this Current Topic will present another perspective by testing the validity of some of the general criticisms of minority preference programs within the context of the experience of African-American radio

14. See Shurburg, 876 F.2d at 914.
15. Id. at 926.
16. Id.
18. Id. at 16.
19. Deregulation and shifting the government's role in guaranteeing civil rights from an active advocate to an observer has negatively impacted minorities. For example, deregulation of the radio industry, which lessened most of the FCC's ascertainment and news requirements, is perceived as indirectly causing minorities to lose jobs. Telephone interview with James L. Winston, supra note 2. There have also been numerous complaints that EEO regulations have not been stringently enforced. See Presentation of Anthony L. Pharr, Office of Communication, United Church of Christ, FCC EEO Conference (Jan. 23, 1989).
20. See, e.g., Croson, 109 S.Ct. at 727 (indicating that none of the evidence presented points to identified discrimination in the Richmond construction industry), and Shurburg, 876 F.2d at 915 (indicating that there is not adequate evidence to demonstrate that minority underrepresentation is the result of past discrimination rather than the fact that minorities may be "disproportionately attracted to industries other than broadcasting.")
broadcasters. To determine whether minority broadcasters encounter discrimination in the acquisition and operation of their stations, and whether there is a nexus between minority ownership and diverse programming, I interviewed twenty African-American broadcasters who collectively own approximately 30% of all African-American-owned radio stations in the United States.\textsuperscript{22}

Section One of this Current Topic analyzes the minority preference programs of the FCC within the policy context of carrying out two compelling government interests: remedying past discrimination and ensuring diverse viewpoints on the public airwaves. Section Two discusses the methodology and the sample group used in the study. Section Three analyzes the obstacles, based on the survey results, often faced by African-Americans in acquiring and operating radio broadcast facilities. Section Four analyzes the nexus between minority ownership and diverse programming using the results of the survey and other studies. Section Five analyzes the impact of the policies on increasing minority ownership of radio broadcast facilities, and makes some preliminary recommendations which might prevent the abuses that occur in sham transactions. Section Six concludes that the policies have been effective.

This Current Topic makes three arguments based on the survey findings. First, many African-Americans have encountered obstacles in their attempts to acquire and operate radio stations, which may result from racial discrimination. Second, African-American broadcasters are likely to offer diverse programming either directly by targeting their program format toward African-American audiences, or indirectly, by including public service information pertinent to minorities even when their stations are not ethnically formatted. Their ownership is also likely to result in other benefits to African-Americans such as increased accessibility to community organizations and beneficial employment and purchasing policies.

\textsuperscript{22} Although these minority preference policies also apply to television broadcasters, this Current Topic focuses on radio broadcasters, who make up the vast majority of African-American owners. As late as 1971, there was not a single African-American owned television station. \textit{Brief for the Federal Communications Commission at 7, n.4, Metro Broadcasting, Inc. v. FCC, cert. granted, 110 S. Ct. 715 (1990) (No. 89-453) [hereinafter FCC Brief].} In 1986, African-Americans owned 21 television stations out of a total of 1,262. \textit{NATIONAL ASSOCIATION OF BROADCASTERS, MINORITY BROADCASTING FACTS 6, 9 (1986) [hereinafter NAB FACTS].}

Interviewees were selected from lists of minority broadcasters that were provided by the National Association of Broadcasters and NABOB. An attempt was made to survey a representative cross-section of African-American radio broadcasters by looking at such factors as geographic location, distribution of AM and FM frequencies and the extent of multiple station ownership. \textit{See infra Appendix A} for the list of interviewees.
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Finally, the minority preference policies have been effective in increasing African-American ownership of broadcasting facilities.

I. The FCC's Minority Ownership Policies

A. Diversification Doctrine

The FCC has rationalized its minority ownership policies as part of its public interest mandate to protect the First Amendment rights of the American public by ensuring that the public airwaves contain diverse viewpoints.23 This diversification doctrine has developed over the years both by statute and through the courts. The FCC is empowered by the Communications Act of 1934 to issue licenses to broadcasters and to make rules and regulations "as public convenience, interest, or necessity requires."24 However, the Communications Act does not specifically define "public interest." The courts have construed the public interest mandate to mean that the FCC must guard the First Amendment rights of the American public by ensuring the broadcasting of diverse viewpoints.25 Although in earlier decisions courts have rationalized the need for program diversity based on the scarcity of broadcasting frequencies,26 recently in Syracuse Peace Council v. FCC27 the United States Court of Appeals for the District of Columbia upheld the FCC's decision that the fairness doctrine no longer served the public interest, since the growth in broadcast outlets eliminated the need for the doctrine. Although some have cited the Syracuse decision as proof that policies promoting minority ownership diversity must also be considered unnecessary,28 the FCC has rejected this interpretation and stated that the demise of the fairness doctrine has no impact on current minority ownership policies.29

B. Expressions of Minority Viewpoints: Race Neutral Policies

Although the diversification doctrine initially emphasized the importance of broadcasting diverse opinions in order to protect the First Amendment rights of the American public in general, after the

28. See Shurburg, 876 F.2d at 921.
29. FCC Brief, supra note 22, at 31 n.25.
mid-1960s and early 1970s a new dimension was added: the importance of expressing minority viewpoints specifically. As a result of social and political pressures, the FCC sought to ensure the inclusion of minority viewpoints with two race-neutral policies: improving minority employment opportunities and ascertainment.

Beginning in 1968, the FCC's EEO requirements mandated broadcasters to comply with specific EEO guidelines, and to submit an affirmative action program. Failure to comply with these requirements could affect a broadcaster's ability to renew his license.

The ascertainment policy, initiated in 1971, required broadcasters to consult with community leaders to determine issues of concern. Broadcasters were required to submit information from their ascertainment surveys when they applied for license renewal.

However, it became increasingly obvious that neither these race neutral policies nor the marketplace were solving the problems of minority underrepresentation in the broadcasting industry. In both 1977 and 1979, the United States Commission on Civil Rights released studies that documented the serious underrepresentation and stereotyping of women and minorities on prime time television. Six years after the FCC's EEO policies were implemented, African-Americans and other minorities still held a small percentage of management jobs in the broadcast industry. In 1977, according

31. See Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 244 (1969) [hereinafter EEO I].
32. See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).
33. In 1981, many of the FCC's ascertainment requirements were reached as part of its deregulation of the broadcasting industry. See In the Matter of Deregulation of Radio, 84 F.C.C.2d 968, 973 (1981) [hereinafter Deregulation Statement].
34. Other race-neutral policies also were adopted later by the FCC to encourage minority ownership. For example, previously the FCC required that a license applicant have sufficient funds to construct and operate a station for one year. After the Minority Ownership Task Force, which was convened by the FCC in 1977, indicated that this requirement was a barrier to minority ownership, the obligation was reduced to three months. See FCC Brief, supra note 22, at 45, n.46.
35. In 1979 the FCC disseminated a listing of minorities who were interested in purchasing broadcasting facilities. Id. at 45, n.47. Finally, the FCC expanded the total number of radio and television stations, thereby increasing opportunities for minorities to enter the broadcast industry. Id. at 45, n.48.
36. This Current Topic argues that although the primary rationale for these policies has been encouraging diverse viewpoints over the public airwaves, a secondary rationale has been to remedy past discrimination. This interpretation reflects the viewpoint in a recent statement by the FCC itself: See FCC Brief supra note 22, at 32-33 (indicating that minority preference policies in broadcasting are justifiably attributable to remediating past societal discrimination).
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to *Window Dressing II*, while 64.9% of the management positions at forty selected television stations were held by white males, only 5.2% and 4.4% were held by African-American males and African-American females respectively. The track record for station ownership by minorities was scarcely better. Although the first African-American broadcaster was licensed in 1949, by 1971 only ten of approximately 7,500 radio broadcast licenses were owned by minorities. The court in *Citizens Communications Center v. FCC* noted that new interest groups and minorities must be given broadcast opportunities and indicated that few stations were minority-owned.

C. Development of Minority Preference Policies

1. Qualitative enhancements in comparative hearings In *TV 9* the D.C. Circuit held that the FCC had erred by not giving proper consideration to an applicant’s minority ownership and participation. The court reasoned that promoting minority ownership was consistent with the FCC’s primary objective of ensuring maximum diversification of ownership of mass communications media, and therefore concluded that the reasonable expectation of diversity, and not advance demonstration, was adequate for a preference to be awarded. After *TV 9*, the FCC began awarding a qualitative enhancement for minority ownership.

Qualitative minority ownership enhancements are awarded during the comparative hearing process for a broadcast license only after it is determined that the applicant is not entitled to a preference under 47 U.S.C. 307(b) or has a clear quantitative advantage.

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37. *Window Dressing II*, supra note 9, at 87.
40. Id.
41. *TV 9*, 495 F.2d at 936-37.
42. Id. at 937.
43. Id. at 937-38. The court reasoned that since there was no requirement for an advance demonstration of the nexus of program diversity to be awarded for a local residence merit, neither should such proof be required for a minority ownership preference.
44. *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) reaffirmed *TV 9* and emphasized that no advance demonstration of a nexus between minority ownership and programming diversity was required.
45. The comparative hearing process seeks to achieve the dual objectives of ensuring the best practicable service to the public and a maximum diversification of control. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [hereinafter 1965 Policy Statement].
46. An applicant who is entitled to a preference under 47 U.S.C. § 307(b) based on her ability to provide first or second local service will prevail without a comparative hearing. Section 307(b) of the Communications Act, Pub. L. No.97-259, 96 Stat. 1093
Two quantitative factors are considered: (1) the applicant’s ownership interest in other broadcasting mass media and (2) the applicant’s integration of ownership and management. If there is no clear quantitative advantage, the candidates are evaluated based on a series of qualitative factors such as: local residence, civic participation, past broadcast experience, and minority and female ownership. Therefore, in order for minority ownership to be considered in the process at least two conditions must be met: (1) there is no § 307(b) preference and (2) there is no quantitative advantage.

2. Minority preferences for tax certificates and distress sales

By 1978, it was apparent that neither the FCC’s policies nor the marketplace were significantly increasing minority ownership. Less than 1% of all broadcast stations, or fewer than 85, were owned by minorities. In April 1977, the FCC held a conference to analyze the reasons for the continued underrepresentation of minority broadcasting owners. Participants complained that years of racial discrimination created barriers that prevented minorities from becoming broadcasters. Purchasing a broadcast license was difficult for minorities since they were outside of the “Old Boy Network” and often did not receive information about potential station sales; they also lacked capital, and could not easily obtain financing. Challenging a license during a renewal was difficult because of the cost, length, and uncertainty of the process.

(1982) (codified at 47 U.S.C., § 307(b)) requires the Commission “to provide a fair, efficient, and equitable distribution” of broadcast service among states and communities. See Winter Park, 873 F.2d at 349.

47. Credit is given to the applicant with no other mass media ownership interest. See Brief for Respondent Intervenor Rainbow Broadcasting Company at 2, Metro Broadcasting, Inc. v. FCC, cert. granted, 110 S.Ct. 715 (1990) (No. 89-453).

48. Credit is given based on the percentage of ownership that will work full-time at the station, with the amount of credit given influenced by the policy-making and management level of the jobs. Id. at 2-3.

49. FCC Brief, supra note 22, at 3.


52. Id. at 9. One problem was that most stations were sold by brokers unaccustomed to dealing with minority clients, who were outside of the “old boy network”.

53. Id. at 14. Commercial banks were reluctant to finance broadcasting facilities which were risky, particularly since the license, often the most valuable aspect of the property, was subject to renewal. Because minorities generally had no prior experience in the broadcasting business, banks were all the more reluctant to lend.

54. Id. at 10. Recently the FCC estimated that completion of the hearing process can take as long as 3-5 years. See The Commission’s Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery) 4 F.C.C. Rec’d 2256, 2257 (March 10, 1989) [hereinafter Lottery Statement]. One of the interviewees indicated that she had spent over $500,000 in legal
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A week after the conference issued its report, the FCC announced two new policies: minority preferences for tax certificates and in distress sales. In 1978, the FCC announced that tax certificates, which allow licensees to defer the capital gains tax on sales, would be awarded to transferors who sold their licenses to groups with minority ownership.\textsuperscript{55} Because prices of broadcast facilities are escalating, a tax certificate is an extremely persuasive incentive since it can result in millions of dollars in deferred tax liability. The distress sale policy allowed a broadcaster whose license has been designated for a revocation hearing or whose renewal application has been designated for hearing on basic qualification issues to assign or transfer her license to a minority ownership group at a “distress sale” price.\textsuperscript{56}

Since the licensee, barring the minority preference, would not normally be able to sell,\textsuperscript{57} the program was beneficial to the seller since she could receive capital, avoid an expensive revocation hearing, and eliminate the stigma of a revoked license. The purchaser received the advantage of purchasing the station at a discount. However, the impact of the distress sale policy was rendered moot by deregulation\textsuperscript{58} and the \textit{Shurberg} decision.\textsuperscript{59}

\textsuperscript{55} Based on Section 1071 of Internal Revenue Code, the FCC has the authority to issue certificates which allow licensees to defer the capital gains tax on sales when necessary to adopt a new policy or effectuate a policy change. Minority Ownership Policy Statement, supra note 11, at 983. Although originally the group had to have at least 50\% minority ownership, after 1982, only 20\% minority-ownership was required. \textit{Id.} at n.20. See \textit{In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting}, 92 F.C.C.2d 849 (1982).

\textsuperscript{56} Minority Ownership Policy Statement, supra note 11, at 983.

\textsuperscript{57} \textit{Id.} Prior to the implementation of the minority preference policies, generally a broadcaster whose license was subject to revocation was not permitted to sell, except under extraordinary circumstances such as in the event of bankruptcy or when the seller was physically or mentally disabled.

\textsuperscript{58} Since the substantial deregulation of the broadcasting industry began in 1981, there has been a significant decline in distress sales. Between 1978 and 1982, there were twenty-six distress sales. However, since 1982, there have been only ten. \textit{Consumer Assistance and Small Business Division, Office of Public Affairs, Federal Communications Commission, Minority Ownership Lists} (1988). [hereinafter \textit{Minority Ownership Lists}]. There have been no minority preferences in distress sales since \textit{Shurberg}; see Porter Testimony, supra note 12, at summary.

\textsuperscript{59} See \textit{Shurberg}, supra note 13.
II. Methodology

When preference programs are evaluated, a critical issue is whether the remedial policy addresses instances of specific racial discrimination. Similarly, when the FCC's minority preference policies have been reviewed by the courts, questions about the presence of racial discrimination arise. The primary source of evidence of racial discrimination in the broadcasting industry to date has been through legislative histories and congressional hearings.

A. Sample Group

To help clarify whether there is racial discrimination in the broadcasting industry, I surveyed twenty African-American broadcasters who collectively own 54 radio stations, or approximately 30% of those owned by African-Americans in the United States. These station owners were selected randomly but with the objective of obtaining responses from different geographic areas and from owners with different levels of experience. While the stations were located in a variety of geographic areas ranging from a small predominantly African-American southern town (Tuskegee, Alabama) to New York City, the greatest concentration of the stations was in the

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60. See, e.g., Fullilove, 448 U.S. at 478 (indicating that while Congress did not include preambulatory findings in its legislation to provide that grantees of the Local Public Works Capital Development and Investment Act of 1976 must set aside 10% of funds for minority enterprises, Congress had historical basis to conclude that remedial action was warranted); Wygant, 476 U.S. at 274 (indicating that societal discrimination alone is not sufficient to justify a racial classification); and Croson, 109 S.Ct. at 714 (stating that the city had failed to show any probative evidence of discrimination in the local construction industry).

61. See, e.g., Shurberg, 876 F.2d at 913-914 (indicating that the FCC seems to justify the distress sale minority preference both as a means to diversify programming and to remedy past discrimination, but faulting both Congress and the FCC for failing to provide any evidence to link minority underrepresentation with specific discriminatory practices in the broadcasting industry); and Winter Park, 873 F.2d at 353 (affirming the District Court of Western Michigan's finding that Congress had determined that minority underrepresentation was the result of prior racial and ethnic discrimination).

62. See, e.g., Winter Park, 873 F.2d at 353 (citing H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982)) as providing the evidence for Congress' assertion that there is minority underrepresentation in the broadcasting industry) and Brief for Respondent Intervenor Rainbow Broadcasting Company, supra note 47, at 14 (indicating that for nearly a decade Congress has held numerous hearings regarding the lack of minority broadcasters).

63. See Appendix A for the list of broadcasters surveyed. It is difficult to determine the exact number of African-American-owned stations. The last comprehensive study conducted by the National Association of Broadcasters in 1986 indicated that there were 150. See NAB FACTS, supra note 22, at 8. The latest membership list of NABOB indicated that there were 184 African-American owned stations. NABOB, membership list (Apr. 6, 1990) (unpublished).
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South. Although there is no scientific basis to conclude that the sample group is typical of the average African-American broadcaster, it is representative of a broad cross-section, and reveals many characteristics that contradict the negative media images of African-American entrepreneurs who seek to enter the broadcasting industry.

I. Prior broadcasting experience Contrary to the image of an inexperienced applicant, 50% of the sample group had prior broadcasting experience before they purchased their first station. Twenty-five percent had more than fifteen years of experience when they purchased their first station. Five owners had been general managers of stations before acquiring their broadcast facility.

Fifty percent of those acquiring broadcasting experience worked either for a Black-formatted or African-American-owned station. Given figures indicating that African-Americans only occupy between 3%-6% of the upper job classifications in the broadcasting industry, it appears that mainstream broadcasting facilities may not be creating adequate opportunities for minorities to acquire experience. One broadcaster, who gained her initial experience in mainstream facilities indicated that she later took a job offer in

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64. See infra Appendix A (eighteen of the 54 radio stations surveyed were in the South).
65. Id. (telephone interviews).
66. See Kinsley, Invidious Distinction, NEW REPUBLIC, Feb. 5, 1990, at 4 (indicating that the people taking advantage of the minority preference rules are "those who are already well-to-do, and those who are simply fronting for white businessmen").
67. These broadcasters reported a variety of experiences. Howard Sanders, who had approximately twenty-five years of experience in the broadcasting industry, had worked as a reporter, hosted a television show, owned and operated an advertising agency and managed WYCB-AM in Washington, D.C. that he now owns. Telephone interview with Howard Sanders, see infra Appendix A. Paul Major had worked for seventeen years both in television and radio before acquiring WTMP-AM in Tampa, Florida. Telephone interview with Paul Major, see infra Appendix A. Charles Sherrell had fifteen years of broadcasting experience and was the general manager of WBEE-AM in Chicago when he purchased it. Telephone interview with Charles Sherrell, see infra Appendix A. William Shearer had twenty years of broadcasting experience and Skip Finley nineteen years, when they bought their first stations. Telephone interviews with William Shearer and Skip Finley, see infra Appendix A.
68. These were Cathy Hughes, Howard Sanders, William Shearer, Charles Sherrell, and Mutter Evans. Telephone interviews, see infra Appendix A.
69. William Shearer, Cathy Hughes, Charles Sherrell, Mutter Evans, and Glenn Mahone had experience with Black-formatted or African-American-owned stations before acquiring their stations. Telephone interviews, see infra Appendix A.
70. See infra note 120.
71. See Presentation of A. Pharr, supra note 19 at 3. Other reports also have indicated that employment opportunities for minorities are either stagnating or declining. See, Payne, In TV News, a Trend Back to Lily-White, Newsday, Sept. 18, 1988 at 9 (quoting a study by Vernon Stone, Director of Research Services for the Radio-Television News Directors Association which indicated that minority representation in broadcast news
Nigeria because she was unable to gain comparable managerial experience in the United States.\textsuperscript{72} Another credited earlier FCC policies with influencing broadcasters to create employment opportunities for minorities that indirectly helped him to get a job with a television station.\textsuperscript{73} However, another broadcaster, who tried to get a job as a newscaster, prior to the implementation of the FCC's EEO policies, was denied the opportunity to be interviewed when he showed up for an appointment, although he had studied at New York University's School of Radio and Television.\textsuperscript{74}

The women broadcasters who were interviewed also had broadcasting experience prior to the time they acquired their first stations. Cathy Hughes had seven years experience and had been the general manager of two radio stations before she purchased her first station.\textsuperscript{75} Mutter Evans had worked in news, sales, public affairs, and finally as a general manager, before purchasing the station of her former employer.\textsuperscript{76} Barbara Lamont had approximately 31 years of various experience in broadcasting, including reporting as well as managing, before she purchased a television station.\textsuperscript{77} Another broadcaster decided to pursue acquiring her own station after a group interested in obtaining a license asked her to participate; but then called the deal off when she demanded that she actually be given some responsibility once the station was acquired.\textsuperscript{78}

2. \textit{Multiple ownership} Most of the broadcasters owned more than one station, with the average being 2.9.\textsuperscript{79} Based on data from the National Association of Broadcasters and NABOB this characteristic may be atypical. Those surveys indicate that the average African-American broadcaster owned a single station.\textsuperscript{80}

3. \textit{AM-FM ownership} Twenty-eight of the stations owned were AM and 26 were FM. This represents a higher ownership of FM stations proportionately than the general population of African-
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American broadcasters. For example, in the latest listing of NABOB members, 112 of the 184 stations owned were AMs; and the last NAB survey reported that 94 of the 150 African-American owned stations were AM.81

4. Length of time in business The average time the surveyed owner had been in broadcasting was approximately thirteen years. Seven had sold a station within the past three years.82 Five had sold some stations to minorities.83 Ten of the sixteen broadcasters who answered this question entered the broadcasting industry between 1971 and 1980. Only one of the broadcasters who was interviewed was in business before 1972.84

5. Ownership structure Most of the broadcasters used a corporate structure. Two indicated that they were 100% owners.85 Of the eleven broadcasters who responded to questions about their specific percentage of ownership, six indicated that their businesses were 100% minority owned.86 One indicated that his business was 95% minority owned.87 Five broadcasters indicated that they owned between 51%-55% of their corporations.88 Three owned between 9%-38%.89 One broadcaster owned 67% of a limited partnership.90

B. Methodology

Broadcasters were asked to identify examples of discrimination that they experienced in acquiring and operating their stations.

81. See NABOB membership list, supra note 63 passim and NAB FACTS, supra note 22 at 8, 15-35.
82. The following broadcasters indicated that they had sold stations during the past three years: Pierre Sutton (3), Howard Sanders (2), Ragan Henry (10-11), Ronald Davenport (1), Robert Lee (7), Jim Hutchinson (2), and Willie Davis (2). Telephone interviews, see infra Appendix A.
83. The following broadcasters indicated that they had sold stations to minorities during the past three years: Pierre Sutton (2), Howard Sanders (2), Ragan Henry (4) and Ronald Davenport (1).
84. Mildred Carter’s family has owned one of its stations since 1950. Telephone interview, see infra Appendix A.
85. Mildred Carter and Ronald Davenport indicated that their families were 100% owners of their broadcasting corporations. Telephone interviews, see infra Appendix A.
86. Charles Sherrell, William Shearer, Howard Sanders, George Clay, Andrew Langston, Jim Hutchinson, Ronald Davenport, and Mildred Carter indicated that their business are 100% minority owned. Telephone interviews, see infra Appendix A.
87. Telephone interview with Pierre Sutton, see infra Appendix A.
88. Charles Sherrell, William Shearer, Howard Sanders, George Clay, Glenn Mahone, and Robert Lee owned between 51-54%. Telephone interviews, see infra Appendix A.
89. Pierre Sutton, Jim Hutchinson, and Paul Major owned between 9-38% of their corporations. Telephone interviews, see infra Appendix A.
90. Telephone interview with Ragan Henry, see infra Appendix A.
They also were asked to identify obstacles they felt characterized the experiences of minorities in the broadcasting industry. Other professionals knowledgeable about broadcasting, such as advertisers, brokers, rating service executives, representatives of trade organizations and representatives of the FCC were also consulted to help evaluate whether these obstacles were the result of racial discrimination.91

III. Obstacles to Minority Station Acquisition

A. Lack of Access to High Quality Stations

Licenses to many of the highest quality stations were issued during the formative years of the regulated broadcasting industry. Since African-Americans were subjected to severe societal and state-sanctioned racial discrimination, however, they were not able to take advantage of these opportunities.92 In the South, where most African-Americans lived prior to World War II, laws which mandated social and economic segregation of the races were generally not overturned until the civil rights struggles of the 1960s and 1970s.93 Since racial discrimination meant that African-Americans were often

91. Among the professionals with whom I consulted and/or interviewed were: John Oxendine, President, and Kenneth Harris, Executive Vice-President, BROADCAP; Dwight Ellis, Vice-President of Minority and Special Services, National Association of Broadcasters; Pluria Marshall, National Black Media Coalition; Daniel Jaffe, Executive Vice-President, National Association of Advertisers; James Winston, Executive Director, National Association of Black-Owned Broadcasters; Rhody Bosley, Vice-President, Sales and Marketing, Radio Station Services, Arbitron; Caroline Jones, Caroline R. Jones Advertising; John Camp, Vice-President, American Association of Advertising Agencies; and Jim Blackburn, Chairman, Blackburn and Company Incorporated.

92. FCC Brief, supra note 22, at 32-33. The FCC indicates that stations using frequencies with the widest coverage and in the largest communities were issued during these earlier years.

93. Although Brown v. Board of Education, 347 U.S. 483 (1954), invalidated the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896) (which had given judicial sanction to legalized racial segregation), it was only after the massive civil rights demonstrations in the 1960s and 1970s that change occurred. See Kerner Report, supra note 5, at 100, 107 (describing the development of legalized segregation in the South particularly after Plessy, and similar discrimination, whether by law or custom, in the North; and describing the impact of the Montgomery bus boycott and the student sit-ins of the 1960s).
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denied access to quality education,\(^9^4\) relegated to unskilled or undesirable employment, and restricted from participating in the mainstream,\(^9^5\) they often lacked capital as well as business experience at the time when broadcasting licenses were being awarded, particularly from 1934-1970.\(^9^6\) However, even the few African-Americans who were in a position to apply for broadcasting licenses in these early years often were discouraged or denied the opportunity to do so. As Percy Sutton, Chairman of Inner City Broadcasting, Inc. recently testified:

... when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent.\(^9^7\)

Similar obstacles were reported by the late Dr. Haley Bell, who purchased a radio station in Detroit in the early 1950s, and indicated that he had tried to buy a radio station for more than 25 years before his successful purchase.\(^9^8\)

As a result of racial discrimination, when African-Americans began to enter the broadcasting industry as license applicants, there were few high quality stations available. While reliable statistics are not available, it has been reported that until 1949 there was not a single African-American owned radio station, and neither were there more than four or five owned in the 1950s.\(^9^9\) One of the greatest spurts of ownership prior to the implementation of the FCC's policies seems to have occurred in 1972 when, according to research conducted by R.D. Bachman, ten stations were acquired by African-Americans, increasing their total ownership to twenty stations.\(^1^0^0\) However, by mid-1973, 85% of authorized AM stations — those most accessible to African-Americans — were allocated, as well as

\(^9^4\) Kerner Report, supra note 5, at 106 ("The South reacted to the Supreme Court’s decision on school desegregation by attempting to outlaw the NAACP, intimidating civil rights leaders, calling for ‘massive resistance’ to the Court’s decision, curtailing Negro voter registration and forming White Citizens’ Councils").

\(^9^5\) Id. at 108 ("A major factor intensifying the civil rights movement was widespread Negro unemployment and poverty. . .").

\(^9^6\) In 1975 approximately three percent of all businesses in the United States were owned by minorities and 0.65% of the gross receipts realized by businesses were realized by minority businesses. H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2 (1975), quoted in Fullilove, 448 U.S. at 465.

\(^9^7\) 1989 Hearing on Minority Ownership 16 (testimony of Percy Sutton), quoted in FCC Brief, supra note 22, at 33.


\(^9^9\) Id. at 16.

\(^1^0^0\) Id. at 17.
68.5% of FM stations. The policy of the FCC is to renew licenses where there is "meritorious service." Because few minorities owned stations, the unintentional result of the FCC's policy which preferred incumbent owners was "inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees".

The impact of the expanding FM station market and price inflation on African-Americans who entered the broadcasting industry in the 1970s had two general results. First, African-Americans tended to purchase AM stations, often of low power, as owners moved to the newly expanding, more expensive FM stations, which had the capability of broadcasting in stereo. A survey conducted in 1974 by the Radio Department of Howard University of twenty-nine African-American-owned radio stations found that 89% were daytime AM stations (i.e., stations whose licenses only allowed them to broadcast from sunrise to sunset) and 50% of the stations were of one kilowatt or less. Therefore, ironically, at the same time FM radio was becoming an important force in the market, African-Americans were concentrating their purchases in the AM market. Second, many of the stations were selling at inflated prices. In contrast, during the formative years of the broadcasting industry, many stations were obtained at comparatively modest costs. Low-power stations were later sold to African-Americans for ten to fifteen times the cost of the original investment.

Today, although there is more diversification in station ownership among African-Americans, the majority of African-American owned stations still are AM and often "small properties, outside large population centers and mainstream advertising demand." Changes in the market for broadcasting properties have caused more frequent combination sales (package deals involving several stations), and

101. See Minority Broadcast Ownership: Hearings Before the Subcomm. on Communications, Senate Comm. on Commerce, Science, and Transportation (1989) (statement of John Payton) [hereinafter Payton testimony]. Similarly, 66.6% of all commercial television stations and 91.4% of UHF stations had been allocated by June, 1973. Id.

102. FCC Brief, supra note 22, at 33.

103. Bachman, supra note 98, at 29.

104. Gross revenues of FM stations increased from $19.7 million to $224 million between 1964 and 1974. Id. at 29.

105. FCC Brief, supra note 22, at 33.

106. See Bachman, supra note 98 (indicating that owners realizing the great desire of African-Americans to purchase stations and the scarcity of available facilities often inflated their prices).

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have thus increased the price of desirable properties. Therefore, many minorities can only afford to buy AM properties. As Jim Hutchinson, a multiple station owner, described the change in the industry:

The whole ballgame has escalated. Properties are harder to get; financing is harder to get; deregulation; the anti-trafficking rule suspension; the number of stations one owner can own; the widespread use of syndications and limited partnerships to buy; the involvement of Wall Street in transactions. There has been a total change in the industry.  

Although there are a handful of African-American broadcasters who, because of their track record with multiple station ownership and their alliances with institutional investors, have access to a multitude of high quality stations, their experience may not be typical of other African-American broadcasters. Some of the other broadcasters interviewed felt that another obstacle which continued to face many minority broadcasters was an inability to receive information about quality station sales since they remained outside of the “old boy network.” Many stations, when resold, are sold through brokers. However, broadcasters complain that brokers do not inform the general public about broadcast opportunities, but favor prior clients. While it is understandable that a seller may not want it to be known that her station is available for sale because of the potential negative impact on her station personnel, newly entering broadcasters or those without established contacts may not learn about deals until after they have occurred. Lack of information and the shortage of available stations may cause broadcasters to accept deals that are not very favorable, just to have the opportunity to enter the business. Mutter Evans, after explaining the tremendous

109. Telephone interview with Jim Hutchinson, see infra Appendix A.
110. For example, Don Cornwell, President and Chief Executive Officer of Granite Broadcasting, indicated that brokers frequently call him about available television stations. Telephone interview with Don Cornwell (Mar. 28, 1990).
111. Telephone interview with William Shearer, see infra Appendix A (“There is an old boy network. They [sellers] would rather sell to a large network or someone they know. We have seen this many times. Major FM stations normally go to big corporations”).
112. Telephone interview with Glenn Mahone, see infra Appendix A (explaining that many deals are never even made available to minority broadcasters). Ironically, similar complaints were voiced by minority broadcasters twelve years ago. See MINORITY BROADCASTING OWNERSHIP REPORT, supra note 51, at 9.
113. Telephone interview with Andrew Langston, see infra Appendix A (complaining that minorities never find out about sales until it’s too late; and suggesting that the FCC provide more information).
difficulty she had in financing her station, which caused her to accept costly financing, summed up the feeling of frustration by saying: "You've got to belong to the network in order to be able to buy something that has a fighting chance. My deal was less than desirable, but I couldn't have gotten in the door otherwise." An earlier analysis of minority ownership confirmed the difficulty about getting information regarding station sales:

Information about stations for sale is not widely circulated. The most fruitful source of such information is the group of firms and individuals that acts as station brokers. Between one-third and one-half of all stations sold are never listed with brokers, however. These stations are purchased as the result of contacts directly between buyers and sellers or through information passed on by communications lawyers, national representative firms, other station owners and similarly established members of the broadcasting community. In practical terms these stations are available only to active members of that community.

B. Difficulty in Obtaining Financing

The greatest problem facing minority broadcasters, according to my survey, is "getting financing and the lack of capital." Many of the problems described echo the complaints voiced at the FCC's 1977 minority ownership conference.117

A principal barrier to minority ownership is the availability of funding . . . Unfortunately, experience has shown that minorities face unusually difficult problems in acquiring financing to purchase a broadcast station . . . Prospectively minority licensees, in most instances, have limited experience in managing broadcast properties and are regarded by financial institutions as relatively high risk borrowers. Additionally, many lending institutions do not like to become involved . . . when the principal asset . . . is a temporary license.118 What has changed since the FCC's conference is the nature of the market and the amount of capital required to enter the broadcasting industry. Today, station purchases are often millions of dollars, and to get a competitive price, a buyer may need to be able to afford a

114. Telephone interview with Mutter Evans, see infra Appendix A.
115. FEDERAL COMMUNICATIONS COMMISSION, OFFICE OF PUBLIC AFFAIRS, EEO MINORITY ENTERPRISE DIVISION, MINORITY OWNERSHIP OF BROADCAST FACILITIES: A REPORT 15 (1979)[hereinafter MINORITY OWNERSHIP OF BROADCAST FACILITIES]. All but one of the three interviewees felt that obtaining financing and the lack of available capital were the greatest problems facing minority broadcasters. Telephone interviews, see infra Appendix A.
116. Telephone interviews, see infra Appendix A.
117. MINORITY BROADCASTING OWNERSHIP REPORT, supra note 51, at 11.
118. Id. at 11-12.
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package deal (i.e., the simultaneous purchase of more than one broadcasting facility).119

Although the requirement that a potential borrower have prior broadcasting experience or equity is not restricted to African-Americans, past racial discrimination makes it more difficult for them to meet these demands. Employment discrimination in the broadcasting industry means that there will not be a large pool of African-Americans with relevant experience, especially in management.120 Also, because past discrimination inhibited the ability of African-Americans to accumulate capital either through high paying jobs or business ventures, they are less likely to have resources to provide equity. As William Shearer, a Los Angeles station owner explained:

Some of the stations in my market now cost $55 million; which means you have to have at least $5 million in equity. There aren't too many of us with that in our checkbooks. This means you have to form groups or syndications. We seem to have problems doing that.121

Established owners, as well as entering broadcasters, find it difficult to meet the spiraling prices of radio stations. Willie Davis, a multiple owner, explained that he decided to sell his AM station in Houston, bought with the expectation of pairing it with a particular FM, because of rapidly escalating prices that caused the six million dollar FM property to go up to thirteen million dollars within a few years.122

African-Americans, due to societal discrimination, may be perceived as "high risk" borrowers in spite of past experience. Jim Hutchinson, today a multiple station owner and at the time of his entry a bank vice-president, was unable to get financing for his first station except through an African-American owned bank.123 Charles Sherrell, who had been for fifteen years the general manager of the station which he later acquired, was turned down by three banks. In the case of two banks, he felt the rejections were due to race since their demands were overly stringent. He was able to get financing from a venture capital company that had attended a NABOB conference.124 Ragan Henry, a partner in a major Philadelphia law firm

119. Telephone interview with John Oxendine and Kenneth Harris, supra note 108.
120. A 1989 report found that African-Americans only occupied between 3-6% of the upper job classifications in the broadcasting industry. See Presentation of A. Pharr, supra note 19, at 3. Telephone interview with Skip Finley, see infra Appendix A (indicating the Catch-22 situation of many African-Americans: they need experience to get the deal financed, but there are limited opportunities to get the experience).
121. Telephone interview with William Shearer, see infra Appendix A.
122. Telephone interview with Willie Davis, see infra Appendix A.
123. Telephone interview with Jim Hutchinson, see infra Appendix A.
124. Telephone interview with Charles Sherrell, see infra Appendix A.
and now the largest African-American multiple station owner, had a friend intercede when the bank threatened to withdraw on the eve of the closing of his first broadcast deal.\textsuperscript{125}

\section*{C. Biases by Rating Services and Advertisers}

A ripple effect of the difficulties in obtaining financing and high quality stations is that African-American broadcast facilities are often highly leveraged and have a greater dependency on advertising revenues to pay debt service.\textsuperscript{126} Advertisers can play a vital role in impacting the financial success or failure of a station.\textsuperscript{127} Many of the interviewees felt that they were not able to generate their fair share of advertising revenue because of racial discrimination that impacted rating services, advertising agencies and advertisers.

\subsection*{1. Inaccurate ratings}

Ratings are of critical importance in attracting advertising.\textsuperscript{128} Since advertisers want their dollars to reach a maximum number of people, they use ratings to estimate the percentage of households in a market listening to a station.\textsuperscript{129} An advertising agency will generally limit its purchases to the top two or three rated stations in a market. Therefore, if a station is rated incorrectly, this error can have a serious impact on its revenues. There are two major ratings services, Arbitron and Birch.\textsuperscript{130} Arbitron, is clearly the most widely used service.\textsuperscript{131} Arbitron however, measures audience listenership primarily by having members of selected households within a market record the stations they listen to within a seven day period.\textsuperscript{132}

\textsuperscript{125.} Telephone interview with Ragan Henry, \textit{see infra} Appendix A.

\textsuperscript{126.} \textit{Id.}

\textsuperscript{127.} \textit{MINORITY OWNERSHIP OF BROADCAST FACILITIES, supra} note 115, at 19.

\textsuperscript{128.} \textit{Id.}

\textsuperscript{129.} \textit{Id.}

\textsuperscript{130.} \textit{Id.} Telephone interview with Rhody Bosley, Vice-President, Sales and Marketing, Radio Station Services, Arbitron (Apr. 4, 1990).

\textsuperscript{131.} National Association of Broadcasters, RAMTF/Final Report (July 13, 1987) (indicating that many advertising agencies would be reluctant to accept competitive rating services since their computer software addresses only Arbitron information).

\textsuperscript{132.} These formats are known as diaries. Households are selected based on a statistical sample of all persons over twelve years old within a metropolitan market, which roughly corresponds to a Standard Metropolitan Statistical Area (SMSA), chosen from a sample frame containing listed and a somewhat smaller mix of unlisted telephones in an area. Before diaries are mailed out, participants are asked by telephone if they will respond. Respondents must fill out the diaries correctly and return them to Arbitron within a specified period of time for their responses to be evaluated. Telephone interview with Rhody Bosley, \textit{supra} note 130.
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For many years minority broadcasters have complained that Arbitron's methodology undercounts African-American listeners. The Minority Ownership of Broadcasting Facilities Report concluded that rating services were not accurately estimating minority listenership of Black-formatted stations. Specifically, the Report found that the services, which based their samples on the census, were not adjusted to compensate for minority underrepresentation in the census. Also, because the sample frame was telephone-based, some minorities would be underrepresented since they had fewer telephones. Interviewees have complained that the methodology is flawed because African-Americans may be less likely to complete diaries; are less likely to have listed telephones; are less likely to receive diaries; and are more likely to have of their listenership impact diluted because a metropolitan market is used to evaluate rather than the city itself (where African-Americans are likely to comprise a proportionately greater portion of the population). Some interviewees have found great discrepancies between their Arbitron ratings and their Birch ratings. In one instance, Arbitron ranked a station numbers eight through ten in appropriate categories, while Birch ranked the station number one in the same categories. If an advertising agency used the Arbitron rating, the station might lose sales. Other broadcasters reported similar discrepancies.

2. Inability to obtain advertising revenues proportionate to their audience share Black-formatted radio stations generally do not generate advertising revenues which are commensurate with their audience share. In a study conducted in 1988 of 809 radio stations which compared twelve formats and their ability to generate advertising revenues commensurate with their audience shares, Black-formatted stations were the second least favorable category. What this means,

133. See Bachman, supra note 98 at 38 (quoting Skip Finley who complained that, although Sheridan Broadcasting's Boston station was the only Black-programmed station in the area, Arbitron had indicated that only 300 males aged 25-49 listened to the station, even though there were 40,000 African-American males in that category in the area).


135. Telephone interviews with Cathy Hughes, Andrew Langston, Jim Hutchinson and Willie Davis, see infra Appendix A.

136. Telephone interview with Willie Davis, see infra Appendix A. Unlike Arbitron, Birch uses a telephone retrieval method.

137. Telephone interview with Andrew Langston, see infra Appendix A.

138. See J. Duncan, Jr., The Relationship Between Radio Audience Shares and Revenue Shares (1988).

139. Id. Black-formatted stations in 1987 had a mean conversion ratio of 70.7 as compared with Hispanic-formatted stations with a mean conversion ratio of 110.1; Urban/Hybrid-formatted stations with a conversion ratio of 91.6; and MOR/Full Service stations with a conversion ratio of 132.4.
for example, is that if a Black-formatted station and a country-formatted station have the same number of listeners according to a rating service, the Black-formatted station can be expected to generate fewer advertising dollars.\textsuperscript{140} Several interviewees expressed frustration at the inability to generate advertising revenues commensurate with their ratings. As Glenn Mahone explained:

\begin{quote}
Radio revenue is based on the market you can deliver. Your revenue is based on the cost per point, which is 1% of the population. In Richmond, advertisers typically pay $30 per point, but when they get to the Black station, they pay $20-25 per point, regardless of the product. O.K. if you’re advertising a Mercedes we may not proportionately have as many customers; but hamburgers?\textsuperscript{141}
\end{quote}

3. Reluctance to advertise on stations owned by African-Americans Interviewees reported two types of discriminatory attitudes of advertisers which affected their ability to generate advertising revenue. The first was a reluctance of national companies to advertise on Black-formatted stations even when the station was one of the top-rated stations in the market.\textsuperscript{142} Broadcast owners attributed this lack of responsiveness to discriminatory attitudes by national companies, who assume that African-Americans do not consume their products. As William Shearer explained when he was chairman of NABOB:

\begin{quote}
Advertisers don’t seem to think that it is necessary to direct their advertising toward the Black market. . . . At NABOB we have made a great effort . . . to try to make the point that Blacks have and spend money and that we buy toothpaste, soap, and mouthwash like everybody else. Yet, usually it’s the same companies which advertise on Black radio . . . and that’s because of a top executive who is personally committed.\textsuperscript{143}
\end{quote}

However, advertising professionals claimed that the failure of national companies to advertise on Black-formatted radio is not the result of intentional discrimination but rather is a market-driven business decision. From their perspective, since companies want to reach the largest possible market, they seek to advertise on general market stations first and use stations with special formats only as specific needs arise.\textsuperscript{144} Whether a national company will include the

\begin{footnotes}
\textsuperscript{140} According to Duncan, a Black-formatted station would typically be expected to convert about 70.7\% of its audience share into advertising dollars, while a country-formatted station could convert 116\%. J. Duncan, \textit{supra} note 138.
\textsuperscript{141} Telephone interview with Glenn Mahone, \textit{see infra} Appendix A.
\textsuperscript{142} Telephone interview with James Winston, \textit{supra} note 2.
\textsuperscript{143} Telephone interview with William Shearer, \textit{see infra} Appendix A.
\textsuperscript{144} Telephone interview with John Camp, Vice-President, American Association of Advertising Agencies (Apr. 6, 1990).
\end{footnotes}
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African-American market specifically within its general marketing campaign may depend on whether there is an advocate within the company or advertising agency who will suggest that African-Americans be included. Advertising professionals indicated that sales decisions are a question of “dollars and cents” and since computer programs often are used to select where advertisements will be placed, frequently the race of the station owners is not known.

Both advertisers and broadcasters agree, though, that a minuscule percentage of national advertising dollars is targeted toward Black-formatted radio. As Waynett A. Sobers, Jr., then Executive Vice-President of Earl G. Graves, Ltd. testified:

The Black consumer market is valued at over $200 billion annually . . . the total national expenditure for advertising in 1984 was approximately $88 billion [of which] $6 billion [was] for radio [advertising] . . . [however,] an estimated $52 million [was spent] in advertising revenue for Black-owned radio stations or less than 1% of total U.S. radio advertising revenues.

Today the situation has not changed much and an extremely small portion of national advertising dollars is devoted to the African-American market. Caroline Jones, who heads one of the leading African-American owned advertising agencies, explained:

It's not unusual for a company that is spending millions of dollars nationally to come to us with $250,000 and say: 'Here, give us a national Black-targeted advertising campaign which will track sales in six days.' It puts us under tremendous pressure since we are limited by our budget to place ads only in selected markets.

African-Americans broadcasters argue that the placement of advertisements is not always a “color blind” process. Local companies, they contend, do know the race of the owner, and may refuse to advertise on the station, even when a large part of their clientele is African-American. An owner of radio stations in a predominately African-American southern city complained that during his fifteen years of operation, the local supermarket chain had spent no more

146. Telephone interview with John Camp, supra note 144.
148. Telephone interview with Caroline Jones, supra note 145. “To track sales” means that a client expects to see a discernible increase in sales of its product to the targeted group.
than $1,000 in advertising with his stations, despite numerous attempts to solicit ads, although the vast majority of the market's customers are African-American. Mutter Evans, who bought the Black-formatted radio station where she used to work, reported that some clients cancelled their advertising as soon as her ownership was announced. One of the most telling incidents was described by Cathy Hughes, who owns a radio station in Washington, D.C., which has a large African-American population:

There is a major drug store chain here in town which has never given us any business. When my son called, he was given an appointment to make a marketing presentation. However, when he arrived, he was forced to give the presentation in the lobby.

One African-American broadcaster, who asked not to be identified, indicated that after he purchased a top-rated radio station in a major metropolitan market, some advertisers discontinued their accounts when it became known that he was the new owner of the station. However, multiple owners of highly rated stations that are not Black-formatted, reported they were unaware of any discrimination by local advertisers.

IV. Is There a Nexus Between Minority Ownership and Programming Diversity?

When people evaluate the nexus between minority ownership and programming diversity they frequently assume that diverse programming is synonymous with Black or urban formatting. While certainly the format of a station is a factor when evaluating its programming diversity, strictly equating diversity with Black-formatting is too narrow. This Current Topic argues that since the objective of the diversification doctrine is to ensure representation of diverse viewpoints, other factors besides format must also be considered. These factors include: the commitment of the station to provide public service announcements or information pertinent to minority viewpoints; the hiring of minorities, who are assumed to be more sensitive to African-American needs; and the presenting of minority

149. Telephone interview with George Clay, see infra Appendix A.
150. Telephone interview with Mutter Evans, see infra Appendix A.
151. Telephone interview with Cathy Hughes, see infra Appendix A.
152. Telephone interview with Ragan Henry, see infra Appendix A.
153. See Bronner, Court Hears Challenge to FCC's Minority Preference, Boston Globe, Mar. 29, 1990 at 3, col. 1. (where Justice Scalia objected to "skin color as a guide to taste").
154. See Associated Press, 326 U.S. at 20. (First Amendment rests on assumption that the dissemination of diverse viewpoints is essential to the public welfare).
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viewpoints. This Current Topic therefore considers these other factors when analyzing programming diversity.

A. Black-formatting

Fifty percent of the stations in the survey were characterized by their owners as being Black or urban-formatted. This compares unfavorably with a finding of a recent report of the Congressional Research Service that analyzed data from approximately 79% of all broadcasting stations in 1988, and found that 65% of all radio stations with at least one African-American owner targeted their programming to African-American audiences. The last survey of minority owners conducted by NAB found that 45% of African-American stations were Black or urban-formatted.

However, both my survey and the NAB analysis indicate that it is a fallacy to strictly equate Black or urban formatting with programming targeted to African-American audiences. For example, although some of the broadcasters were clearly targeting their programming toward African-American audiences or expected to draw a high percentage of African-American listeners, they chose not to categorize themselves as Black or urban-formatted. One owner, whose station’s call letters were derived from the initials of African-American leaders, described his station as “mass market with a Black base.” Another broadcaster, whose two stations were established to fill a void for African-American listeners in the general Kansas City market, described her facilities as “general market with Black news.” Some African-American broadcasters may not want to characterize their stations as Black or urban-formatted because they feel station formats make it more difficult to attract advertising revenue than general market or “disco” stations, which nonetheless may be targeted towards African-American audiences. This avoidance of a Black-format label is understandable since analyses indicate that urban, news, or general market stations are much more

155. See Kerner Report, supra note 5, at 211 (indicating that the media must employ more African-Americans to have a better link with their ideas).
156. Telephone interviews, see infra Appendix A.
157. Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus, at Appendix (1988). The study found that the greater the African-American ownership, the more likely the programming will be targeted towards an African-American audience.
158. NAB Facts, supra note 22, at 12.
159. Telephone interview with Andrew Langston, see infra Appendix A.
160. Telephone interview with Mildred Carter, see infra Appendix A.
likely to earn proportionately greater advertising revenues when compared to audiences shares. When my survey results are adjusted to include other categories that might be expected to be targeted toward African-American audiences (such as gospel and jazz), 61% of the stations were African-American targeted. Similarly when the NAB analysis is adjusted to include other African-American targeted categories (i.e. black contemporary, rhythm and blues, black/Jazz, etc.), the percentage increases to 68%.

Another important question that needs to be answered in order to evaluate the impact of minority ownership is whether it results in any qualitative content differences in Black-formatting. Historically, Black-formatted radio was controlled by white owners. The first Black-formatted radio Station, WDIA in Memphis, Tennessee in 1947, was an instant financial success and by 1977, there were approximately 108 Black-formatted stations. However, these stations were often criticized for their lack of news coverage and their failure to serve "the needs of the black community." A study conducted by James Philip Jeter found that while African-American-owned stations diversified their music selections more than White-owned Black-formatted stations, there was not a significant difference quantitatively in the amount of time devoted to news and public service announcements. Jeter, however, cautioned that a truly representative analysis must include a qualitative component, since comparing minutes devoted to categories of programming may not reveal differences in the programming. A later study by Marilyn Diane Fife, an assistant professor at Temple University, confirmed the importance of qualitative analysis. Although Dr. Fife's comparison of the news coverage of a White-owned and African-American-owned television station (WGPR) in the same market did not reveal significant differences in the time allocated to various news topics, except that the African-American owned station did not devote as much coverage to crime, there was a significant difference

162. See J. DUNCAN, JR., supra note 138 and accompanying text.
163. This represents about 32 of the 54 stations.
164. NAB FACTS, supra note 22, at 12.
165. Bachman, supra note 98 at 13, 57.
166. Id. at 58.
168. Id. at 145.
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in the content of the topics covered. WGPR used a greater number of African-Americans in newsmaker roles and there was a higher coverage of issues with racial significance.\(^{170}\)

**B. Policies Encouraging Diverse Viewpoints**

My survey revealed that many of the broadcasters tried to benefit the African-American community by including public service information pertinent to minority groups. Other spinoff benefits that minority ownership encourages are the employing and promoting of minorities, and the use of minority vendors.

1. **Employment** Of the seventeen broadcasters who responded to the question about the racial composition of their workforce, thirteen had staffs with greater than 70% minorities.\(^{171}\) Seven had staffs which were 80% or more African-American.\(^{172}\) The tendency of African-American owned stations to employ more minorities than White-owned, Black-formatted stations has been confirmed by other studies. For example, a study conducted by Paul Milton Gold of African-American-owned and White-owned Black-formatted stations found that 82% of the Black-owned stations had African-American general managers as compared to 27% of the White-owned stations.\(^{173}\) Nearly 74% of the Black-owned stations had more than 75% African-American employees compared to fewer than 38% of the White-owned, Black-formatted stations.\(^{174}\)

Some of the broadcasters indicated that they tried to ensure that their African-American employees were given maximum opportunity. One broadcaster indicated that he helped a highly qualified African-American woman, who had been in a dead-end position under the previous ownership, to become a station manager. The same broadcaster stated that he was helping one long-time African-American employee, who had not been promoted for several years

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\(^{170}\) Id. at 45.

\(^{171}\) Charles Sherrell, Paul Major, Jim Hutchinson, Willie Davis (throughout his broadcasting corporation), Howard Sanders, George Clay, Ronald Davenport, Glenn Mahone, Cathy Hughes, William Shearer, Mutter Evans, Pierre Sutton (in New York) and Bennie Turner reported that they had over 70% minority employees. Telephone interviews, see infra Appendix A.

\(^{172}\) Mutter Evans, Bennie Turner, Howard Sanders, George Clay, Glenn Mahone, Cathy Hughes, Charles Sherrell and Jim Hutchinson reported more than 80% minority employees. Telephone interviews, see infra Appendix A.


\(^{174}\) Id.
prior to the interviewee's ownership, acquire a radio station. An- other broadcaster deliberately attempted to integrate the adminis- trative staff of his station. Previously, African-Americans had been employed only as disc jockeys. Even an owner whose station is in a community with less than 1% minority population actively re- cruited other minorities, who today comprise 8% of her staff.

2. Public service Many of the owners surveyed have a sense of commitment to the African-American community that may influence their programming decisions, even though the primary factor in such decisions are market demands. For broadcasters with Black- formatted stations purchased from non-minority owners, this has re- sulted in a greater willingness to make the station accessible to com- munity organizations, to increase community service announcements, or to provide other services over-the-air. While fulfilling a need, these activities did not generate revenue and prior owners either did not recognize them as important or were unwilling to do them. For example, a broadcaster who owns a Black- formatted station in a southern city began broadcasting obituaries as a public service because she recognized that many African-Ameri- can families could not afford the fee charged by local newspapers. The enhanced commitment of African-American broadcasters to serving the African-American community, even in predominantly White markets, was also reflected in attempts to include information regarding the viewpoints or concerns of minorities, even though the majority of the programming was not minority-targeted. A broad- caster in Hart, Michigan, which has a minority population of less than 1%, provided in-depth coverage of Martin Luther King, Jr. on his birthday and tried to include other pertinent information whenever possible.

V. Are Minority Preference Policies Effective?

A. General Impact

All of the broadcasters felt that the FCC's policies to encourage minority broadcasting were successful in improving opportunities to purchase stations. Eleven of the 20 broadcasters interviewed had used the FCC's minority ownership policies in the acquisition of

175. Telephone interview with Ragan Henry, see infra Appendix A.
176. Telephone interview with Ronald Davenport, see infra Appendix A.
177. Telephone interview with Nancy Waters, see infra Appendix A.
178. Telephone interview with Mutter Evans, see infra Appendix A.
179. Telephone interview with Nancy Waters, see infra Appendix A.
Are Minority Preferences Necessary

their stations. Eight were involved in transactions with tax certifies, five had acquired stations through distress sales, and one had acquired a station where a minority preference in a comparative hearing was instrumental. Many of the station owners attributed the ability to use one of the preference policies with their ability to purchase a station. Many associated the preference policies with the willingness of the seller to consider a minority purchaser, or with opening the door to an opportunity.

Jim Hutchinson is believed to be the first minority to use the preference policy in a distress sale. Hutchinson was trying to purchase WLTA-AM in Gary, Indiana whose license was being challenged because of its policies of broadcasting material which was racially offensive. After the city of Gary indicated that the shutting down of the station would be a great disservice to the city, the FCC agreed to let the station sell the property to a minority within 30 days. Similar stories have been reported by other owners, regardless of the markets they operate in and the number of stations which they own. Willie Davis believed that the tax certificate significantly enhanced his ability to acquire at least three stations. Bennie Turner credited the distress sale with being responsible for his ability to acquire two stations in Columbia, Mississippi where otherwise he would not have been able to get the cooperation of the prior owners. Nancy Waters, whose purchase was adjudicated in West Michigan, attributed her ability to acquire a station in Hart, Michigan to the preference policy in the comparative hearing process.

In short, the policies have been effective in helping minorities to gain access to the informal network of influential members of the broadcasting industry, which allows them to learn more easily about and participate in sales. Because sellers now are anxious to gain the advantages of the tax certificate, brokers have increased their contacts with potential minority purchasers.

The greatest impact of the policies has been the growth in ownership among African-American broadcasters. As the executive director of NABOB said, "Before 1978, there were approximately 80 radio stations and one TV station. Now there are some 184 radio

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180. Telephone interviews, see infra Appendix A.
181. Telephone interview with Jim Hutchinson, see infra Appendix A.
182. Telephone interview with Willie Davis, see infra Appendix A.
183. Telephone interview with Bennie Turner, see infra Appendix A.
184. Telephone interview with Nancy Waters, see infra Appendix A. However, when Ms. Waters applied initially, she made no effort to obtain a preference because of her race or gender.
185. Telephone interview with Jim Blackburn, see infra Appendix A.
stations and 15 television stations. This growth is directly attributable to the FCC's policies.”¹⁸⁶

B. Sham Transactions

A by-product of the minority preference policies has been the development of sham transactions. Sham transactions are those where a minority, who has no intention of operating or retaining a business enterprise, allows herself to be presented as the titular head of an organization (i.e., in control of the voting stock) in order that her White partners can receive the benefit of the minority preference policy. In these transactions the minority typically makes no substantive equity contribution and intends to sell her interest once the license is awarded. Because there is never any sustained minority ownership, these policies are a sham.

The press has sometimes publicized these transactions as justifications for ending the preference policies; however, this would throw out the baby with the bath water. New regulations are needed to curb these abuses. However, suggestions for regulations to halt shams, while not impeding sincere minorities' entry into the broadcasting industry, probably are best developed after greater dialogue between minority broadcasters and the FCC. One suggestion might be to institute policies requiring an owner who obtains a station through a minority preference to retain ownership for a certain amount of time. Another might be to require a certain minimum amount or percentage of equity to be contributed by minority owners who use preferences. However, policy-makers must take care that such policies do not arbitrarily establish equity thresholds, which will impede sincere minorities who wish to participate in large-scale broadcasting transactions.

VI. Conclusion

This Current Topic has analyzed African-American ownership in the radio broadcasting industry in order to clarify the necessity of the FCC's minority preference policies. This study has shown that years of racial discrimination directed against African-Americans prevented them from being able to acquire high quality stations in the early years of the regulated broadcasting industry when the majority of frequencies were allocated. The FCC's policy of preferring

¹⁸⁶. Telephone interview with James L. Winston, supra note 2.
Are Minority Preferences Necessary

to renew licenses, as well lender financing policies that require certain levels of capital and broadcasting experience, have contributed to the gross underrepresentation of minorities in the broadcasting industry.

Minority preference policies are necessary to address past discrimination and ensure that minority viewpoints are represented on the public airwaves. Race neutral policies—such as ascertainment or encouraging minority employment—and marketplace strategies have both failed to solve these problems.

The more than doubling of minority licenses since minority ownership policies were initiated can largely be attributed to the existence of these preference programs. While this Current Topic has focused primarily on the broadcasting industry, similar studies regarding other industries are also likely to show that minority underrepresentation is due to racial discrimination rather than to the failure of minority groups to be attracted to a particular industry. As one broadcaster said,

Years ago it was stated that minorities could not be successful operators of franchises. However, once the door was opened, this prediction was proved wrong. A similar situation exists in broadcasting. Once the FCC’s minority preference policies created the opportunity, we were eager to enter the industry.\(^{187}\)

\(^{187}\) Telephone interview with Glenn Mahone, see infra at Appendix A.
**Appendix A: Interviewees**

<table>
<thead>
<tr>
<th>Broadcaster</th>
<th>Interview Date</th>
<th>Number of Stations Owned</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mildred Carter</td>
<td>5/3/89***</td>
<td>two</td>
<td>Kansas City, Mo.</td>
</tr>
<tr>
<td>George Clay</td>
<td>5/1/89***</td>
<td>two</td>
<td>Tuskegee, Ala.</td>
</tr>
<tr>
<td>Ronald Davenport</td>
<td>4/24/89</td>
<td>three</td>
<td>Pittsburgh, Buffalo</td>
</tr>
<tr>
<td>Willie Davis</td>
<td>4/19/89***</td>
<td>five</td>
<td>Los Angeles, Milwaukee, Denver</td>
</tr>
<tr>
<td>Mutter Evans</td>
<td>5/1/89</td>
<td>one</td>
<td>Winston-Salem</td>
</tr>
<tr>
<td>Skip Finley</td>
<td>5/4/89***</td>
<td>two</td>
<td>Salt Lake City, Washington, D.C.</td>
</tr>
<tr>
<td>Cathy Hughes</td>
<td>5/2/89</td>
<td>two</td>
<td>Washington, D.C.</td>
</tr>
<tr>
<td>Jim Hutchinson</td>
<td>4/21/89</td>
<td>six</td>
<td>New Orleans</td>
</tr>
<tr>
<td>Barbara Lamont</td>
<td>4/25/89</td>
<td>one**</td>
<td>Rochester, N.Y.</td>
</tr>
<tr>
<td>Andrew Langston</td>
<td>4/27/89***</td>
<td>one</td>
<td>Cordele, Albany, Ga.</td>
</tr>
<tr>
<td>Dr. Robert Lee</td>
<td>4/24/89***</td>
<td>four</td>
<td>Tampa</td>
</tr>
<tr>
<td>Paul Major</td>
<td>5/4/89***</td>
<td>one</td>
<td>Richmond, Petersburg, Fredericksburg, Virginia</td>
</tr>
<tr>
<td>Glenn Mahone</td>
<td>4/26/89</td>
<td>three</td>
<td>Los Angeles</td>
</tr>
<tr>
<td>William Shearer</td>
<td>4/18/89</td>
<td>one</td>
<td>Washington, D.C.</td>
</tr>
<tr>
<td>Howard Sanders</td>
<td>5/5/89***</td>
<td>one</td>
<td>Chicago</td>
</tr>
<tr>
<td>Charles Sherrell</td>
<td>5/1/89</td>
<td>one</td>
<td>New York City, San Antonio, Berkeley, Ca.</td>
</tr>
<tr>
<td>Pierre Sutton</td>
<td>5/4/89</td>
<td>six</td>
<td>Columbus, Ohio</td>
</tr>
<tr>
<td>Nancy Waters</td>
<td>4/26/89</td>
<td>one</td>
<td></td>
</tr>
</tbody>
</table>

* includes four in negotiation  
** a television station  
*** reinterviewed during April, 1990.
Appendix B: Questionnaire

1. Please indicate the call letters and location of all of the stations which you own and whether they are AM or FM.
2. How many years have you been in the broadcasting business?
3. When did you acquire your first station? At the time of its acquisition, did you have any broadcasting experience? If so, please describe.
4. Did you use any of the FCC's minority ownership preference policies when you acquired your stations? If so, please describe the impact of the policy on your acquisition.
5. Generally, do you think that the FCC's minority ownership preference policies have impacted minority ownership in the broadcasting industry? Please explain.
6. Which of the FCC's minority ownership preference policies do you think is the most effective and why?
7. What changes would you recommend in the FCC's minority ownership preference policies to make them more effective?
8. Have you personally encountered any racial discrimination when you attempted to acquire a station? If so, please explain.
9. Have you encountered any racial discrimination in the day-to-day operation of your station? If so, please explain.
10. What do you think is the greatest obstacle generally facing minorities when they attempt to enter the broadcasting industry?
11. Have you sold any stations in the past three years? If so, what was your primary reason for selling? Were any of your stations sold to minorities?
12. What is the ownership structure of your broadcasting business (i.e. corporation, partnership, "S" corporation)?
13. What percentage do you own personally?
14. What percentage is minority owned?
15. What programming format do you use on your stations? Was there any significant change in the format after you acquired the station?
16. What percentage of your staff is minority?
17. Has the percentage of minority employees increased or decreased since your ownership?