

# AN UPDATE ON THE MINORITY PREFERENCE AT THE FEDERAL COMMUNICATIONS COMMISSION

Laurence B. Alexander\*

## I. INTRODUCTION

In *National Black Media Coalition v. FCC*,<sup>1</sup> a federal appeals court was faced with a challenge to the Federal Communications Commission's newly-created AM Daytimer preference. The preference gave an advantage to daytime-only radio stations which compete in comparative proceedings for FM licenses. The gravamen of the complaint was that such a preference tended to undermine the preference for minority ownership that was established by the Commission in 1978. The court left undisturbed the Commission's decision to implement the daytimer preference.

This Article will review both preferences. With respect to the minority ownership preference, the Article will trace its developments over the last decade and review any challenges to its constitutionality. Additionally, it will illustrate the conflict between the policy choices presented by the two preferences. To resolve the conflict, this Article proposes that the Commission and Congress make sure the minority preference and the laudable goals behind it have a chance at success.

## II. COMPARATIVE HEARINGS

In the Federal Communications Act of 1934, Congress established the Federal Communications Commission and charged it with regulating the airwaves to reduce the amount of interference.<sup>2</sup> Pursuant to this obligation, the Commission was empowered by Congress to grant licenses to applicants for radio stations for periods of up to three years<sup>3</sup> "if public convenience, interest, or necessity will be served thereby . . ."<sup>4</sup> Accordingly, if two or more applicants file for use of the same or interfering facilities the Commission must proceed by way of comparative hearing among all qualified applicants.<sup>5</sup> The Commission's 1965 *Policy Statement on Comparative Hearings*<sup>6</sup> established the criteria for choosing among qualified new applicants for the same broadcast facility. These criteria include: (1) diversification of control of the media

---

\* Assistant Professor of Communications, Temple University. B.A. 1981, University of New Orleans; M.A. 1983 University of Florida; J.D. 1987, Tulane Law School. Mr. Alexander is a member of the Louisiana State Bar Association.

1. 822 F.2d 277 (2nd Cir. 1987).

2. Communications Act of 1934, Pub. L. No. 73-416, § 307(a), 48 Stat. 1064, 1083-84 (1934). (codified at 47 U.S.C. § 307(a) (1982)).

3. *Id.* 47 U.S.C. at § 307(d). In 1981, Congress changed license terms to five years for television and seven years for radio.

4. *Id.* at § 307(a) (1982).

5. T. B. CARTER, M. A. FRANKLIN and J. B. WRIGHT, *THE FIRST AMENDMENT*, (1986).

6. 1 F.C.C. 2d 393 (1965).

of mass communications; (2) full-time participation in station operation by owners.<sup>7</sup> (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; (6) character; (7) other factors.<sup>8</sup> The two primary criteria in comparative hearings are diversification and securing the best practicable service.<sup>9</sup>

### III. MINORITY PREFERENCE

#### A. *The Early Efforts*

Policies regarding minority participation and ownership in mass communications were started by the Commission during the civil rights movement, and moved forward fairly rapidly. In 1968, the Commission articulated policies and principles which would guide it in considering complaints that its licensees or would-be licensees had discriminated against minorities in their employment practices.<sup>10</sup> In 1969, the Commission adopted rules which forbade discrimination on the basis of race, color, religion or national origin, and required that "equal opportunity in employment . . . be afforded by all licenses or permittees . . . to all qualified persons."<sup>11</sup> The next year, the Commission adopted rules requiring most of the licensees within its jurisdiction to file annual employment reports and a written equal employment opportunity program.<sup>12</sup> These were followed in later years by successive affirmative action plans.<sup>13</sup>

At about the same time, the issue of awarding merit to increase minority ownership surfaced. In 1973, in *TV 9, Inc. v. F.C.C.*,<sup>14</sup> the Commission had refused to award merit to an applicant in a comparative proceeding based upon minority ownership and participation. Comint Corporation, an unsuccessful applicant in the proceeding, complained that no merit was awarded to it by reason of its substantial Black ownership and participation.<sup>15</sup> In reversing the decision by the Commission, the court approved of the use of a policy

7. The policy statement said that this factor is important in securing the best practicable service.

8. This involves assurances of examination of any relevant and substantial factor. *Id.* at 394-99.

9. *Id.* at 394.

10. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C.2d 766 (1968).

11. Nondiscrimination Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766, 776 (1969).

12. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 979 (1970).

13. Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 F.C.C. 2d 354 (1975); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976).

14. 495 F.2d 929 (D.C. Cir. 1973).

15. *Id.* at 935.

The principals of Comint were two local black residents, Paul C. Perkins, who had 7.17% voting stock interest, and James R. Smith, M.D., with a 7% like interest. Both have lived in the local area, of which about 25% of the population are black for more than 20 years, and have not only been active in advancing the interests of the Black members of the community but also have been primarily responsible for significant achievements in bettering conditions for the black population. The interest owned by these principals is considered substantial since the highest interest owned by any of Comint's principals was 10%. Additionally, while there was no merit accorded to Comint by reason of this Black ownership and participation, some credit was given under the criterion of ownership participation in management, due to Mr. Perkins' role in that connection.

*Id.* at 935-36.

that would aid minorities in securing ownership and management of media facilities.

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship.<sup>16</sup>

Thus, the court held, merit should be accorded when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint.<sup>17</sup>

In a supplemental opinion, the court distinguished the use of "merit" from "preference." "Merit" or "favorable consideration" is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. "Merit" therefore is not a "preference" but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded the preference.

Nevertheless, the *TV 9* court reversed the Commission's decision that minority preferences should be granted only after the minority applicant demonstrated a nexus to program diversity. The court concluded that it could be assumed that minority ownership would foster program diversity when there is integration of ownership and management. The Commission, therefore, should have awarded merit to the minority applicant in *TV 9* without first requiring a demonstration of a nexus between minority ownership and increased program diversity.<sup>18</sup>

Two years later in *Garrett v. F.C.C.*,<sup>19</sup> the court clarified its *TV 9* holding, stating that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that reasonable expectation without advance demonstration gives them relevance."<sup>20</sup>

### B. *A Preference is Born*

Despite the progress of minority participation, the FCC acknowledged in its 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*<sup>21</sup> that its prior efforts were insufficient. "While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media."<sup>22</sup> The Commission reaffirmed its commitment to significantly increasing minority ownership of broadcast facilities.<sup>23</sup> Specifically, the Commission stated it will use its authority to grant tax certificates to transferors or assignors who sell their stations to minority owner-

---

16. *Id.* at 937-38.

17. *Id.* at 938.

18. *See Id.*

19. 513 F.2d 1056 (D.C. Cir. 1975).

20. *Id.* at 1063.

21. 68 F.C.C. 979 (1978).

22. *Id.* at 980.

23. *Id.* at 982.

ship.<sup>24</sup> Additionally, the Commission proposed the sale or assignment of licenses to minority ownership at distress sale prices.<sup>25</sup> Later that same year, the Commission concluded that minority ownership and participation should receive credit in the comparative process.<sup>26</sup> The FCC decided to treat this factor as an enhancement to the standard comparative criterion of integration of management, an element used to evaluate which competing applicant is likely to produce the best practicable service to the public.<sup>27</sup>

Moreover, in 1981, Congress amended the Communications Act, requiring the Commission to adopt rules and procedures to ensure that "groups or organizations or members of groups or organizations, which are under-represented in the ownership" of broadcast facilities be granted significant preferences.<sup>28</sup> Concern over the constitutionality of the statute forced Congress to significantly narrow the scope of the preference language.<sup>29</sup> The revised bill provided for a preference to be granted to any applicant controlled by a member or members of a minority group, defined as Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.<sup>30</sup>

In 1984, in *West Michigan Broadcasting Co. v. F.C.C.*,<sup>31</sup> West Michigan Broadcasting sued to challenge the grant of a "substantial enhancement" to Waters Broadcasting Corporation. The grant to Waters was based on it was an enterprise fully owned by a Black, who would be fully responsible for its day-to-day management.<sup>32</sup> The court agreed with the FCC findings that racial minorities were inadequately represented in the broadcast media, and that additional measures were necessary to increase minority participation.<sup>33</sup> Thus, the court upheld the Commission's policy choice, concluding that the FCC's position in this case was consistent with the overall policies it has pursued.<sup>34</sup>

The next year the District of Columbia Circuit Court struck down a preference for female ownership and participation in *Steele v. F.C.C.*<sup>35</sup> In the same opinion, however, the court gave its endorsement to the preferences for minorities.<sup>36</sup> Interestingly, Judge Wald, in a dissenting opinion, questioned how the court could find the female preference beyond the Commission's statutory authority, especially when it is based on the same rationale as the minority enhancement.<sup>37</sup>

### C. Other Minority Preference Devices

In conformity with the minority preference policy, the FCC has developed a comprehensive set of administrative devices and procedures designed to enhance opportunities for minority ownership.

24. *Id.* at 982-983.

25. *Id.* at 983.

26. WPIX, Inc., 68 F.C.C.2d 381 (1978).

27. *Id.*

28. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-37 (1981).

29. *Steel v. F.C.C.*, 770 F.2d 1192, 1196 n.4 (D.C. Cir. 1985).

30. 47 U.S.C. § 309(i)(3)(C)(ii) (1982).

31. 735 F.2d 601 (D.C. Cir. 1984).

32. *Id.* at 607.

33. *Id.* at 612.

34. *Id.*

35. *Steel*, 770 F.2d 1192 (D.C. Cir. 1985).

36. *Id.* at 1196.

37. *Id.* 1200, 1207 (Wald, J., dissenting).

i. *Tax Incentives*

The Commission offers tax incentives for the sale of broadcast facilities to minorities. Since 1978, the FCC has examined assignment and transfer applications where a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased.<sup>38</sup> The agency vowed to use its authority to grant tax certificates to the assignors or transferors where it would advance the policy of increasing minority ownership.<sup>39</sup>

ii. *Distress Sales*

Moreover, the 1978 Policy Statement allowed for the transfer or assignment of licenses at a "distress sale" price to applicants with significant minority interest, assuming the assignee or transferee meets all the other qualifications.<sup>40</sup> It was hoped that this provision would further encourage broadcasters to seek out minority purchasers. Specifically, this policy permitted licensees whose licenses had been designated for revocation hearing or whose renewal applications had been designated for hearing on basic qualification issues to make a distress sale to minority interests.<sup>41</sup> Additionally, a distress sale had to be effected prior to the beginning of the hearing and had to be at a price of no more than 75% of the station's fair market value as of the date on which the hearing was designated.<sup>42</sup>

Upon concluding that this policy was helpful in facilitating minority ownership of broadcast stations, the FCC expressed that extending the availability of the distress sale option may further enhance the effectiveness of the policy. Thus, the Commission in 1985 proposed to permit sales of broadcast properties to minorities after a revocation or renewal hearing has commenced, provided the transaction is entered into prior to the filing of proposed findings of fact and conclusions of law and the sale price is no more than 50% of the fair market value.<sup>43</sup>

iii. *Lottery*

In 1982, Congress amended the Communications Act and mandated a mass media lottery, or random selections scheme, as an alternative to the comparative hearing process.<sup>44</sup> In accordance with express statutory authorization, the lottery system includes special preferences for racial and ethnic

---

38. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 982-83 (1978).

39. *Id.* at 983.

40. *Id.*

41. *Id.*

42. Distress Sale Policy for Broadcast Licensees, 50 Fed. Reg. 42047 (1985).

43. *Id.*

44. 47 U.S.C. § 309 (i)(3)(A) (1982). That section states:

The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications . . . . an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

minorities.<sup>45</sup> The underlying policy objective of such a preference is to promote the diversification of media ownership and consequent diversification of programming content.<sup>46</sup>

#### iv. *Clear Channel Rules*

Additionally, the Commission's revised clear channel rules provide preferential treatment to minority-controlled candidates for new AM stations.<sup>47</sup> In so doing, the Commission "attach[ed] high importance to fostering the participation of heavily under-represented minorities in the ownership and the operation of broadcast stations. All three branches of the Federal Government have recognized this as a major need."<sup>48</sup> In a footnote, the Commission noted that this amendment is consistent with the judgment of the Supreme Court.<sup>49</sup>

#### D. *Constitutionality*

The minority enhancement policy has withstood challenges on constitutional grounds. In *West Michigan Broadcasting Co. v. F.C.C.*,<sup>50</sup> the court turned back claims by West Michigan that the FCC's use of enhancement for minorities in this case violates constitutional equal protection principles. The court explained that the FCC comparative evaluation process generally conforms to the affirmative action model espoused by Justice Lewis Powell in *University of California Regents v. Bakke*.<sup>51</sup> This process explicitly provides for examination of a wide variety of traits to assess an applicants' potential for increasing diversity and quality of programming.<sup>52</sup>

*Bakke* was a challenge to the use of race quotas for admission to the medical school of the University of California at Davis.<sup>53</sup> Justice Powell's model recognized the right of a state university to use minority enhancement policies to attain a diverse student body in order to expose students to the "atmosphere of 'speculation, experiment and creation' — so essential to the quality of higher education — [that] is widely believed to be promoted by a diverse student body."<sup>54</sup> To this, the court likened the FCC's goal of attaining diverse programming on the belief "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>55</sup> Thus, the FCC's goal of bringing minority perspectives to the nation's listening audiences would reflect a substantial governmental interest within the FCC's competence that could legitimize the use of race as a factor in evaluating permit applicants.<sup>56</sup>

Another indication of the constitutionality of the FCC's consideration of

45. *Id.*

46. *Id.*

47. *Clear Channel AM Broadcasting*, 78 F.C.C. 2d 1345 (1980), *recons.* 83 F.C.C.2d 216 (1980).

48. *Clear Channel AM Broadcasting*, 78 F.C.C.2d 1345 (1980).

49. *Id.* at 1369.

50. 735 F.2d 601, 614 (D.C. Cir. 1984).

51. 438 U.S. 265 (1978).

52. *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 615 (D.C. Cir. 1984).

53. *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Allan Bakke, who was denied admission to the medical school, filed suit contending that the refusal to admit him was the result of a special admissions program.

54. *Id.* at 312.

55. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 n. 4 (1965).

56. *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 614 (D.C. Cir. 1984).

minority status is that Congress approved the Commission's goals and means. In *Fullilove v. Klutznick*,<sup>57</sup> the Supreme Court upheld the constitutionality of a congressional enactment of an affirmative action plan, requiring that a certain percentage of federal construction funds go to minority-owned enterprises. It was important, the court said, that there had been action by Congress because of Congress' "broad remedial powers" derived from its express constitutional authority "to enforce equal protection guarantees,"<sup>58</sup> and because of its competence to find as a factual matter the existence of past identifiable discrimination.<sup>59</sup> As applied to the situation in *West Michigan*, the court viewed the passage of Section 115 of the Communications Amendments Act of 1982<sup>60</sup> both as congressional approval of the FCC's minority ownership promotion policies and as giving congressional confirmation to the factual bases of those policies' remedial nature.<sup>61</sup>

### E. *Minority Preference Reconsidered*

Over the past decade, the Commission has administered three of these policies — the application of racial, ethnic and gender preferences, the distress sale policy and the issuance of tax certificates for licensees who sell broadcast properties to minorities. There are strong indications, however, that these policies are losing substantial support. In 1986, the Commission asked for a reexamination of these affirmative action programs.<sup>62</sup> The proceeding was prompted by concerns regarding the continuing legality of these policies as a result of the *Steel* case and several recent Supreme Court cases. The Commission asked for a remand in the case in order to determine whether a record can be established that would support the constitutionality of its preference scheme. The motion for remand was granted October 9, 1986. The Commission also has decided that this is an appropriate occasion to determine whether comparative preferences, distress sales and tax certificates are appropriate as a matter of policy.<sup>63</sup>

Meanwhile, the results of a recent press report on the progress of minority ownership revealed that minorities had gained some stations but not nearly enough to wave success banners.

The policies have brought a big increase in the number of stations controlled by minorities; the total now is more than 250, compared with fewer than 85 when the federal rules took hold in 1978. Many of the properties are small radio stations. But the total number of U.S. broadcasting stations also has grown sharply, leaving only 2.1% controlled by minorities in 1986, little changed from 1.9% in 1982, according to the National Association of Broadcasters, a trade group.<sup>64</sup>

---

57. 448 U.S. 448 (1980).

58. *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 615 (D.C. Cir. 1984) (citing *University of California Regents v. Bakke*, 440 U.S. 265 at 448, 483 (1980)).

59. *Id.* at 615 (citing *University of California Regents v. Bakke*, 438 U.S. at 438, 501 (1980)).

60. 47 U.S.C. § 309 (i)(3)(A) and (C)(ii) (1982).

61. *West Michigan Broadcasting v. F.C.C.*, 735 F.2d 601, 616 (D.C. Cir. 1984).

62. Notice of Inquiry Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 52 Fed. Reg. 596 (1987).

63. *Id.*

64. Barnes, *Investors Use Blacks as Fronts to Obtain Broadcasting Licenses*, *The Wall St. J.*, Dec. 11, 1987, at 1, col. 1. (The article focuses on how wealthy Whites are in fact dominating stations that

### III. DAYTIMER PREFERENCE

#### A. *The Daytimers*

Daytime-only AM licensees ("daytimers") are AM band radio broadcasters who for technical reasons may only broadcast during daylight hours.<sup>65</sup> An extended quotation from an opinion by Judge Friendly explaining some technical limitations is illustrative.

From its very beginning, federal regulation of standard AM radio service has been complicated by the fact that radio waves do not act in the same way when the sun is up as when down. During the day, the part of the radio signal directed skyward (the "skywave") is dissipated in the atmosphere, and only the portion moving parallel to the ground (the "groundwave") provides useful service. At night, however, the ionosphere reflects the skywave signal back to earth, and if the skywave is strong enough, a station can land an audible signal in large areas that its groundwave does not reach. This, however, is not an unmixed blessing. If the skywave lands in an area already receiving service from another station on the same frequency, the two signals may destroy one another so that only garbled noises will be audible.<sup>66</sup>

These limitations on the hours when daytimer stations can operate effectively eliminate those stations from the market during some of the most lucrative portions of the broadcast day.<sup>67</sup> These effects are most pronounced during the winter months when the daylight hours are shortest.<sup>68</sup> Despite the financial disadvantage of operating only during the day, the FCC has found that daytimers have provided excellent service to the localities they serve.<sup>69</sup> In an attempt to improve the daytimers' lot, the FCC expanded the hours daytimers may broadcast to the extent technically feasible.<sup>70</sup>

#### B. *Rationale for Preference*

The main rationale for seeking a preference for daytime-only stations rested on the relative position daytimers held with respect to other applicants in comparative proceedings for an FM channel newly assigned to a community.<sup>71</sup> It was feared that "[e]xisting comparative criteria could entitle competing applicants for such FM facilities to a diversification preference over daytime-only licenses, thus potentially foreclosing a means by which these experienced broadcasters could expand their service to the public."<sup>72</sup>

The daytimer stations found themselves in a poor competitive position because of the limitations on hours of operation.<sup>73</sup> Because of this position, the National Telecommunications and Information Administration ("NTIA") filed a petition for rulemaking with the FCC, suggesting that the FCC con-

---

claim minority control and are using minority partners to acquire lucrative broadcast stations and licenses while some sellers receive big tax breaks).

65. *National Black Media Coalition v. F.C.C.*, 822 F.2d 277, 278 (2nd Cir. 1987).

66. *WBEN, Inc. v. United States*, 396 F.2d 601, 605-06 (2nd Cir. 1968).

67. *Hours of Operation of Daytime-Only AM Broadcast Stations*, First Report and Order, 95 F.C.C. 1032, 1054 (1983).

68. *Id.*

69. *National Black Media Coalition v. F.C.C.*, 822 F.2d 277, 278 (2nd Cir. 1987).

70. *Id.* (citing *In re Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, Second Report and Order, 101 F.C.C. 2d 638, 643-44 (1985)).

71. *National Black Media Coalition v. F.C.C.*, 822 F.2d 277, 279 (2nd Cir. 1987).

72. *Id.* at 279.

73. *Id.* at 278.

sider giving daytimers some form of consideration in comparative proceedings for new FM facilities.<sup>74</sup> Among other proposals, it was suggested that the FCC give a preference to daytimers applying for FM stations.<sup>75</sup>

### C. *Special Consideration for Daytimers.*

Before any preference was granted for daytime-only AM licensees, public comments were received regarding such a policy. The majority of the commenters favored a substantial preference.<sup>76</sup> Some commenters, however, expressed concern that, if daytime-only licensees receive some form of preference, it could undercut the Commission's policy of increasing the number of minority broadcasters. They claimed that if the preference granted is too great, it could foreclose opportunities for minority broadcasters to obtain these new FM allotments in their communities.<sup>77</sup> Despite these concerns, the Commission concluded that it is in the public interest to afford some form of special consideration to daytime-only licensees.<sup>78</sup> Moreover, the FCC chose the comparative hearing process as the desirable vehicle for accomplishing this objective.<sup>79</sup>

This conclusion was based on several factors. First, daytimers are unique in that they are limited to daytime-only operation and do not receive the benefit of nighttime operations. Second, the technical restrictions on these stations place a limit on the amount of relief that can be provided. Third, the Commission believes that since the stations are able to operate in the public interest within these limitations, they will be able to likewise operate an FM station in the public interest. Finally, the Commission believed that some positive recognition of these stations' work in limited facilities — perhaps through some form of a preference — would encourage all licensees to maximize the provision of service to the public.<sup>80</sup>

In analyzing the criteria for choosing among qualified new applicants for the same broadcast facility, the FCC found the first comparative factor, diversification, can lead to a predominant preference because of the importance the Commission places on this factor. The second criterion, securing the best practicable service can lead to a significant preference, depending on the extent of full-time participation in station operation by the owner. This requirement is enhanced by the owners' local residence, past participation in civic affairs, previous broadcast experience and minority ownership because these qualities increase the likelihood of securing the best practicable service.<sup>81</sup> Thus, the FCC believed that affording comparative credit to daytime-only licensees who apply for a new FM channel would increase the likelihood of

---

74. *Id.*

75. *Id.*

76. In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 F.C.C. 2d 638, 641 (1985).

77. *Id.* Specifically, the National Association of Black Owned Broadcasters, Inc., while generally supportive of a preference, suggests that the preference be weighted such that non-minority daytime-only licensees would not be preferred over minority applicants. Also, the National Black Media Coalition recommended that daytime-only licensees not be granted a preferred status for the new FM allotments which would otherwise have gone to minorities.

78. *Id.* at 644.

79. *Id.*

80. *Id.* at 643.

81. *Id.* at 645.

providing the best practicable service. Also, because of the limitations in which they successfully operated daytime-only stations, the FCC believed the daytimers would also operate the full-time FM facilities in the public interest. Therefore, when a daytime-only station competes for an FM station in its community, the Commission will grant the station a preference by upgrading the value of the station's broadcast experience as an integration enhancement so that it would be equal to the enhancement value of local residence or minority ownership.<sup>82</sup>

#### IV. *NATIONAL BLACK MEDIA COALITION V. F.C.C.*

The National Black Media Coalition filed a petition in the United States Circuit Court of Appeals for the Second Circuit for review of the FCC's order granting daytimer radio stations a preference in comparative proceedings.<sup>83</sup> Petitioners claimed that the Commission effectively reduced the number of opportunities for minority-owned companies when it determined that daytime-only licensees should get a preference during consideration for issuance of new FM licenses.<sup>84</sup>

In this case, the court was faced with reviewing a policy choice made by a federal agency. In such situations, it is the duty of the reviewing court to follow administrative procedure and let stand the decision of the agency unless it is arbitrary.<sup>85</sup> Courts do not generally substitute their decisions for those of agencies, which have the expertise in looking at a record and making a reasonable decision based on that record.<sup>86</sup>

The court found reasonable the conclusion by the Commission that broadcasters, such as the daytimers, who have done a good job of serving the public interest under several limitations would be especially likely to operate an FM facility in step with the public interest.<sup>87</sup> Also gaining support from the court was the Commission's hope that granting daytimers a preference would encourage others to provide quality service in the hope that the FCC will later reward their efforts. Thus, the court concluded, the Commission has stated rational reasons for its creation of a daytimer enhancement.<sup>88</sup>

Additionally, the court deferred to the Commission's view that the correct balance was struck in weighing the importance of improving the lot of daytimers with the policy of encouraging minority ownership.<sup>89</sup> The court,

---

82. *Id.* The enhancement will be granted only if the daytimer requesting it satisfies five conditions: (1) the applicant's broadcast experience must be "based on previous substantial participation in management of a daytime-only station," (2) the daytime-only station must be broadcasting in the same community as the proposed FM station; (3) the daytimer "must have owned the daytime-only station for three continuous years prior to designation of the FM application for hearings;" (4) the owner of the daytime-only station must "propose to be integrated in the operation of the FM station;" and (5) the daytimer "must pledge to direct itself of the daytime-only station within three years."

83. *National Black Media Coalition v. F.C.C.*, 822 F.2d 277 (2nd Cir. 1987).

84. *Id.*

85. *See generally* G. O. ROBINSON, E. GELLHORN & H. H. BRUFF, *THE ADMINISTRATIVE PROCESS* 27 (2nd ed. 1980).

86. *See* B. J. MEZINES, J. A. STEIN, J. GRUFF, 5 *ADMINISTRATIVE LAW* § 51.03 (1987).

87. *National Black Media Coalition v. F.C.C.*, 822 F.2d 277, 281 (2nd Cir. 1987).

88. *Id.*

89. *Id.* at 282.

therefore, declined to substitute its judgment for that of the Commission.<sup>90</sup>

In accepting the reasoning of the FCC, the court accepted for the sake of argument the claim by the National Black Media Coalition that the daytimer preference would dilute or eliminate opportunities that minority station owners would receive through the minority preference.<sup>91</sup>

## V. CONCLUSION

In the preceding decades, the FCC seemed to have been charting a sound course for increasing minority ownership and management of broadcasting stations. The most recent statistics, however, indicate that the Commission's minority preference policies are falling far short of expectation. Nevertheless, some may argue that a plan with minimal effectiveness is better than having no plan at all. Granting a preference to the daytimers that is equal to the preference awarded minorities will, of necessity, adversely affect the attempts at increasing minority ownership. With AM radio stations now largely owned by Whites, an apparent racial imbalance in the makeup of station ownership is only exacerbated by the granting of a preference to a group of owners that is for the most part non-minority. In the present conflict, the Commission made a policy decision. In choosing to help the AM daytimers earn greater profits, it seems the need to increase minority ownership became lost. Moreover, while it is appropriate for the court to defer to the wisdom of specialized government agencies, the court should assure itself that an adequate finding was made by the regulatory body.

## VI. CONCLUDING OBSERVATIONS

When various preferences are awarded to more than one group of applicants, it is inevitable that a conflict between the preferences would arise. In such instances there are two possible solutions. Assuming the preferences were created by the agency, one possibility is to follow the course taken by the FCC with respect to the present conflict. The commission, faced with a segment of good performing AM daytime radio station owners and mindful of the stations' public interest requirement, chose to reward this performance by including a preference for daytimers. The other option would be for the Congress to move forward and establish a comprehensive set of rules favoring whichever policy choice that elected body selects. In the latter case, Congress has not so chosen to act.

The problem with the first option is that it is economically based to the extent that it was awarded in part based on the AM daytimers' inability to reap the same financial profits as other commercial stations which are not so limited in operation hours. By contrast, the minority preference, which must take a back seat to the daytimer preference, is more closely linked to the broader social policy of increasing minority participation and the FCC's policy of increasing diversity. The issue raised by these policy choices is whether either or both is consistent with the FCC's duty to determine the public interest and then operate within its sphere. Many good reasons can be given on each side for the preferences.

---

90. *Id.*

91. *Id.* at 281.

Something, however, must be done to address the minority preference, lest it is swallowed up by such economic-oriented measures as the AM daytimer preference, which is not totally unlike a form of protectionism. Perhaps the FCC or the Congress can now consider giving minorities a priority over all other preferences when an FM station becomes available. If, in fact, the purpose and effect of the daytimer preference is not to emasculate the minority preference, then supporters of the daytimer enhancement might not turn a deaf ear on counter measures to protect and preserve the minority preference.

#### VII. ADDENDUM

On March 2, 1988, more than a year after the Commission called for reconsideration of its minority preference policies, the review process ended. The end drew near when Congress intervened with some very strict guidelines on the Commission's 1988 appropriations bill. The Congress added to the FCC's appropriation a provision prohibiting the use of those funds "to repeal, to retroactively apply changes in, or to continue a reexamination of the policies of the Federal Communications Commission . . . to expand minority and women ownership of broadcasting licenses . . ." Therefore, the Commission, acting in compliance with this Congressional mandate, closed the reconsideration proceeding and agreed to reinstate the racial, ethnic and gender-based policies that were in effect prior to the reexamination period.<sup>92</sup>

---

92. Broadcast Services; Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 53 Fed. Reg. 6697 (1988).