Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest

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I. Introduction: Minority Commercial Radio Ownership and the Public Interest

This study examines more than 11,000 records from the Federal Communications Commission's (FCC) Consolidated Database System (CDBS) and Internet sources on radio ownership and program formats in mid-2009 to analyze the effect of FCC licensing and multiple ownership policies on minority ownership of commercial radio stations, program diversification, and service to the American public.[2] This analysis is timely and important as the FCC prepares for its quadrennial review of broadcasting rules in 2010, mandated by the Telecommunications Act of 1996 (§202(h)). Analyzing media ownership is critical because "[i]t is upon ownership that public policy places primarily reliance with respect to diversification of content, and that has proven to be significantly influential with respect to editorial comment and the presentation of news" (TV9, 1994, p. 938).

During an era marked by the Internet's expansion, radio ownership merits study as a key source of news, public affairs and entertainment programming. Arbitron, a service which tracks radio and other media trends, reported that in 2008 over 90% of all Americans over age 12 listened to the radio each week, exceeding the penetration of "television, magazines, newspapers or the Internet" (Arbitron, 2009, p. 2). While Internet use is increasing, not all households have Internet access or even a computer (Fox, 2008; Kolko, 2007). Pew reported that in 2008, 73% of all Americans went online, compared to 59% of African-Americans and 32% of Spanish-dominant Americans (Fox, 2008). Internet access has been persistently lower for people without a high school degree or those with incomes under $30,000 (Fox, 2008). Free radio programming through inexpensive and readily available radios continues to shape public opinion, debate and democracy in the digital age.

This study analyzes data about media ownership diversity, a cornerstone of FCC policies to ensure that the broadcast spectrum serves the public interest (*CBS. v. Democratic Nat'l Comm.*, 1973; *FCC v. League of Women Voters*, 1984, *National Broadcasting Co., Inc. v. United States*, 1943). This report identifies minority commercial radio broadcasters, examines their corporate structure and the stations they control, illuminates the role of FCC licensing and consolidation policies on minority ownership entry, and confirms that minority radio owners contribute in huge numbers to program diversity.

This study was launched through a grant from the Social Science Research Council as a foundational step for a project by Assistant Professor of Law Catherine Sandoval and Professor Allen Hammond, IV, both of Santa Clara University School of Law, in conjunction with the Minority Media and Telecommunications Council (MMTC), to research minority radio ownership. The research team recognized that the first hurdle was identifying minority radio broadcasters. Thanks to cooperation between MMTC and Free Press, the researchers received information on the radio stations Free Press identified in mid-2007 as minority-owned for its report, "Off the Dial: Female and Minority Radio Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis" (Turner, 2007). Dr. Carolyn Byerly also provided information on the stations she identified as minority owned in her study, "Questioning Media Access, Analysis of FCC Women and Minority Ownership" (Byerly, 2007).

To identify current minority radio owners and examine issues and policies affecting minority ownership in the midst of the 2008-2009 economic downturn, Professor Sandoval extracted and analyzed FCC data and information on the Internet about minority broadcasters' identity, structure, station status, entry dates, markets, and formats. This report adds to the literature by studying the FCC's *Application database* as a source and methodology for identifying broadcast trends. Close examination of the FCC's Application database revealed the growing number of minority radio broadcasters who have transferred their stations due to bankruptcy, liquidation, workouts with lenders, or whose stations are silent for financial reasons.

This analysis revealed many problems with the FCC's methods for collecting and reporting broadcaster information. The FCC datasets create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between large groups of broadcasters. The FCC databases are so cumbersome that the Commission itself does not rely on the agency's databases for rulemaking, turning instead to private sources that put that same data in a format more conducive to analysis (Napoli 2007, Napoli and Karaganis, 2008). This practice conflicts with the FCC's duties under the Administrative Procedures Act (APA) and the Data Quality Act (DQA) to ensure that rulemaking is based on reasoned and discernable analysis (*Id*.)

According to the FCC's CDBS records in mid-2009, 324 minority owners control 815 commercial radio stations. Fifty-three percent, or 172, of the 324 minority commercial radio owners in mid-2009 were awarded their *first* license among the radio station licenses they still control, *prior to the Telecommunications Act of 1996*. The 1996 Act ended the restrictions on the number of stations a corporation could control nationally and dramatically raised the number of stations that could be under common control in a local market.

Despite industry-wide consolidation, 61% or 198 minority commercial radio owners in mid-2009 control only one station. The predominance of single-station owners made it difficult to withstand the market's sea change in the wake of the 1996 Act, which opened the floodgates of consolidation. A handful of minority owners were positioned for expansion after the 1996 Act, although they formed smaller station groups than the dominant broadcasters in the industry. In mid-2009 only 14 minority broadcasters control 10 or more commercial radio stations, while only 3 minority-owned companies control 25 or more stations.

This research provides fresh evidence of the nexus between minority commercial radio ownership, diversity, and service in the public interest. Minority radio broadcasters overwhelmingly contribute to the diversity of American radio programming by airing minority-oriented formats: 591 of the 815 minority owned commercial radio stations air minority-oriented formats. If the 24 silent minority-owned stations are eliminated, 74.7% of the minority broadcasters offering programming in mid-2009 air minority-oriented programming.

The FCC reported that in June 2009 it had licensed 4,789 AM radio stations, all of which were commercial, 6,460 commercial FM radio stations, and 3,106 educational or non-commercial FM radio stations (FCC, 2009c). There were 11,249 commercial AM and FM stations in June 2009, and minorities controlled 7.24%, or 815, of those stations. The U.S. Census reported that in 2008, 104.6 million Americans were members of the racial or ethnic minority groups the FCC tracks, constituting 34% of the U.S. population, a level almost five times higher than their representation among owners of commercial broadcast radio stations (U.S. Bureau of the Census, 2009).

II. Minority-Owned Commercial Radio Stations in Mid-2009

A. Study Methodology and Overview of Findings

To determine the current levels of minority commercial radio ownership, Professor Sandoval reviewed over 11,000 FCC CDBS records, examining ownership reports (Form 323s), applications in the separate CDBS Application files, and where necessary, CDBS Station Status reports. This study builds on the information from the 2007 studies by Free Press and Byerly on minority and female radio ownership (Turner, 2007; Byerly, 2007). To identify changes in licensee or station control, as well as additional stations that a licensee had acquired, Professor Sandoval reviewed all 323 ownership forms available between April and August 2009 for 776 minority radio broadcast stations identified in Turner's study. To identify new minority broadcasters and additional stations acquired by incumbent minority broadcasters, Professor Sandoval analyzed all ownership forms filed between June 2006 and August 2009 signifying a transfer of control of a station license or construction permit, or the award of an original construction permit authorizing the building of a station.

This study reports on the status of operational stations, as opposed to construction permits. A station authorized by a construction permit may never be built due to the financing needed to locate space for a radio tower, antenna and equipment, conduct engineering studies and hire personnel necessary to create an operational station. The financial challenges mount in the midst of an economic downturn when the sectors that have dominated radio revenue, retail, banking, automotive and real estate, are declining or advertising elsewhere. 2008 was the first year that advertisers spent more money on the Internet than on radio (Ruitenberg, 2008). In 2008 Internet advertising revenue rose 10.6% to $23.4 billion while radio ad revenues fell 9% to $19.5 billion (Media Buyer Planner, 2009).

This study identified 24 "unbuilt" construction permits held by minority owners, some of whom obtained those permits in an FCC auction (See, for example, Miriam Media, New FM, Facility Identification No. 17093, Ownership Form and 301 Application). If built, those construction permits may become stations, but are not yet licensed to cover or serve an area.

Those construction permits are not counted in the 815 minority-owned radio stations since they are not yet licensed radio stations, and some may never be built.

For all full-power commercial radio stations Professor Sandoval identified as minority-controlled in 2009, she reviewed the FCC's CDBS Application database filings on station transfers, acquisition dates, bankruptcies, requests for silent operation and licenses to cover or provide service. To examine the contributions of minority commercial radio station owners to program diversity in 2009, Professor Sandoval searched the Web for format and station information for each of the 815 minority-controlled stations, examining the station's Website, where available, Ontheradio.com and other Internet sources. Over 300 of the minority-owned stations identified in this study operated websites highlighting their programming and mission.

Due to the challenges the FCC's database erects to longitudinal analysis, this analysis reflects stations that minority owners still control today. The FCC did not ask for race, ethnicity, and gender data on the 323 ownership forms until 1998, making it very difficult to track minority radio transactions before that time. Archival research in the ownership and application databases and of the paper records not included in the electronic databases, such as tax certificate transactions, comparative hearings, distress sales, and construction permits granted before 1998, would be necessary to identify other minority broadcasters who sold their radio stations before 2007. Their entry and exit into broadcasting merits further research beyond this study's scope.

The level of voting control required to identify a licensee as minority-owned is a threshold issue for this analysis. The FCC has no active definition of minority control since it currently operates no programs that take minority ownership into account. This study, as did Turner's and Byerly's studies (2007), defines 50% or greater control of the licensee's votes as minority control.[3] This definition excludes 4 companies that operate 13 stations where minorities control 50% of the votes and a non-minority controls the remaining 50%,[4] and one company where the minority president does not have majority voting control.[5]

Free Press's analysis of the FCC Form 323s determined that in 2007 minorities controlled 776 full-power radio stations (Turner, 2007). Turner (2007) also analyzed the BIA database of all radio licensees and identified "279 stations where the race/ethnicity of the owner could not be determined [and] estimated that minorities own 812 stations or 7.76 percent of all stations" (p. 16). In contrast to the Free Press 2007 report, this study does not employ a statistical estimate of minority ownership for stations whose ownership could not be identified, and instead verified minority ownership through the FCC Form 323s and applications, Web searches, and experts in the field. The FCC's new filing window for ownership applications will open in late-2009. The new filing requirements will reveal whether there are additional minority-owned broadcasters whose ownership cannot currently be confirmed due to the FCC's filing exemption for sole proprietors and single majority shareholders, and its lax enforcement of rules requiring complete and accurate filings.

This report identified 324 distinct minority commercial radio station owners in mid-2009.[6] Those owners control 815 full-power commercial radio stations.[7] Of the 324 minority radio stations owners, 139 are Hispanic and 129 are African-American. Thirty-four Asian-Americans or Asian/Pacific Islanders control full-power commercial radio stations in 2009, as do 14 Native Americans owners.

Minority ownership of commercial radio stations remained flat during the past two years. There are 815 minority owned commercial radio stations in 2009, compared to 812 stations Free Press identified in 2007, including Turner's estimate of 36 minority-controlled stations whose ownership he could not verify. During that same time period, the number of commercial radio stations grew from 10,506 in 2007 to 11,249 in 2009. Minorities control 7.24%, or 815, of the commercial radio stations in 2009.

The Davidson Media Group (DMG) transactions with SS Holdings (SSH) account for 43 of the new minority-owned stations in 2009. The deal's terms indicate that it may be a lender workout. Two private equity groups, CapStreet II LP and Citigroup Venture Capital, controlled DMG, a company that was not minority-owned owned though it aired primarily Spanish and Gospel formats. In 2009 DMG was sold to SSH, whose managing member, Sanjay Sanghoee, a South-Asian-American, controls 100% of the votes of SSH. SSH paid $1,000 cash to acquire 36 of DMG's stations, all of DMG's stock, and assume $2,076,024 of DMG's debt (Radio Business Report, 2009). The equity partners who controlled DMG retain preferred stock in SSH, convertible into substantial voting rights. SSH now controls 43 stations previously licensed to DMG.

During a recession featuring tight credit and equity markets when few radio transactions were consummated, the SSH February 2009 deal for DMG's radio assets is extraordinary. The low price SSH paid for DMG's stock indicates that this deal is likely a workout with DMG's creditors. The SSH DMG transaction is not a trust pending liquidation, and SSH has not announced a plan to sell all of the stations. The SSH deal structure contrasts with the 2009 transfer of 25 stations previously controlled by Hispanic-owned Border Media Company to a trust for its lenders, designed as a workout of Border Media's debt and a mechanism to liquidate the company by selling the stations (KWOS FM, CDBS Application, 2009). Since a minority controls 100% of the votes of SSH, those stations are included in this study as minority-owned. Without the DMG deal with SSH, minorities would control 772 commercial radio stations in

2009. Researchers analyzing minority ownership should monitor SSH's sales and other transactions.

B. Bankruptcies, Liquidations and Lender Workouts

Between 2007 and August 2009, 42 minority-owned radio stations were transferred to bankruptcy trustees, trusts established for the benefit of lenders as workouts, or to a trustee for a debtor-in-possession who may be able to reorganize under Chapter 11 of the Bankruptcy Code or liquidate the trust's assets under Chapter 7 (Bankruptcy, 11 U.S.C. §101(41), 1101, 2009). Hispanic-owned Universal Broadcasting filed for Chapter 7 bankruptcy and sold its station in July 2009; Tama Broadcasting, an African-American controlled company, transferred 9 stations to a bankruptcy receiver in 2009; On Top Communications, an African-American controlled company, sold two stations as a Debtor-In-Possession in 2007; Ga-Mex, a Hispanic-owned company whose three other stations are silent for financial reasons, transferred one station to a trustee for a Debtor-In-Possession in 2009; Denver Media, a Hispanic-owned company, transferred four stations as a Debtor-In-Possession and sold them in 2009; and Border Media transferred 25 stations in 2009 to a trust controlled by its lenders in settlement of its debts. These 42 previously minority-controlled bankrupt stations are not included in the 815 minority-controlled stations in mid-2009.

The FCC's database makes it extraordinarily difficult to determine if these bankruptcies, lender workouts, and debtor-in-possession sales represent a high or typical number of transactions for minority-owned stations, let alone for all stations. The FCC collects and reports such transactions through its Form 316 in the Application database, a form that signifies a "pro forma" or involuntary transfer of control, such as a corporation's transfer of a license to a commonly controlled Limited Liability Company. A longitudinal analysis of bankruptcy filings would require a researcher or policymaker to review *ALL* Form 316s filed within the relevant time period and search them one-by-one to determine whether transfers were made in connection with bankruptcy, liquidation, or a lender workout.

This study recommends that the FCC establish a separate filing category for transfers to bankruptcy trustees, debtors-in-possession or trusts established as a lender workout, recognizing the extraordinary nature of such transactions. The current system creates huge barriers to scholarly, public, or FCC identification of broadcaster failures or distress, issues crucial to examining the status of broadcast ownership and the effect of FCC rules on the broadcast industry and the public it is licensed to serve.

C. Minority Commercial Radio Broadcaster Stations Silent for Financial Reasons

The FCC requires that stations that are silent (not broadcasting during hours in which they are authorized to operate) for more than 30 days file a Special Temporary Authority (STA) request with the FCC to continue silent operation (47 C.F.R. 73.1740, 2008). The FCC form for silent operation requires the broadcaster to check one of three circles to indicate their reason for being silent: Technical, Financial, or Staffing. The licensee is also required to provide a narrative of reasons that merit the FCC's approval of their silent operation. This requirement ensures that valuable spectrum is used in the public interest and that there are good reasons for temporary periods of non-operation, such as a hurricane damaging a broadcast tower. Nonetheless, the FCC grants some STAs for reasons stated as "Unknown". To monitor trends among broadcasters who have gone dark, this study recommends that the FCC enforce its requirements that the licensee publicly state its reasons for silent operation.

Eighteen minority-owned stations filed for silent operation for financial reasons in late 2008 or 2009. With the economy's souring, the number of financial dark stations among minority-owned commercial radio broadcasters rose each year from 2007 to 2009. Several stations requesting FCC approval to go dark said the economy made operation impossible. Many of those stations had aired minority-oriented formats including Spanish formats, representing a loss of programming to the community. A total of 24 minority-owned stations are silent in mid-2009, the other 6 stations for technical reasons such as improving their signal or dealing with lease or tower issues.

The CDBS database does not enable a search for stations silent for financial reasons, though the STA forms contain that information. A longitudinal analysis of silent operation trends or a comparison of minority and non-minority owners would require a continuous review of tens of thousands of records. This creates an analytical burden so high it defies attempts to meet the APA or DQA's requirements for reasoned decision-making.

This study recommends that the FCC improve the search capability of the CDBS Application database, as well as its Ownership database. In response to critiques from scholars such as Byerly (2007) and the U.S. Government Accountability Office (GAO, 2008), in 2009 the FCC ordered its Media Bureau to improve the Form 323 ownership applications and that database's functionality (FCC, 2009, FCC 2009b). Some of the most important trends in broadcasting are found through the Application database, which other studies of minority broadcasters and the FCC have not examined in detail. This report urges the FCC to improve the ability to search and analyze the Application database which houses information about silent stations, transfers of control including sales, and transfers to bankruptcy trustees or lender trusts. Increasing the Application database's transparency will enable longitudinal, comparative analysis of the effect of FCC policy decisions on broadcasters, including minority-owned broadcasters.

D. The Structure of Minority Radio Ownership: Primarily Single Station Owners:

Among minority commercial radio owners in mid-2009, 61%, or 198, control only one station. Turner (2007) found that 67.8% of minority radio station owners in 2007 controlled one station. The needle has not moved much for the structure of minority ownership since the National Telecommunications and Information Administration (NTIA) last reported in 2000 that most minority owners controlled a single station (NTIA, 2000).

Until mid-2009, the FCC exempted licenses controlled by sole proprietors or a single shareholder that owned 50% or more of the licensee's voting stock from filing Form 323 ownership reports (FCC, 2009, GAO, 2008). In 2009, 73%, or 237, of the form 323s filed for minority owners indicated that one minority person controlled 100% of the votes. This overwhelming margin of single-voter control substantiates the conclusion that the FCC's rules exempted a large swath of owners. To better track the effect of FCC policies on "small, minority or women-owned businesses," the FCC eliminated this exemption in May, 2009 (FCC, 2009, ¶12). The FCC will make revised Form 323s available for filing in late 2009. The new 323 Form and filing rules will paint a better picture of single-station owners throughout the industry. Improving the search tools to analyze the ownership and application databases will enhance this information's value to the public.

E. FCC Licensing Policies, Multiple Ownership Rules and Minority Broadcaster Entry

This study determined that minority radio ownership increased measurably between 1978 and 1995 when the FCC adopted several programs to spur the participation of new broadcasters, and the entry and growth of minority broadcasters. Of the 324 minority commercial radio *owners* in mid-2009, 172 or 53% were awarded their *first license prior to the 1996 Act*. Of the 815 minority commercial radio *stations* still held in mid-2009, 287 or 35% were obtained before the

1996 Act. Fewer new minority owners who still hold their licenses in mid-2009 *entered* the commercial radio field after 1996, as compared to those who entered between 1978 and 1995.

Prior to 1978, only 40 commercial radio stations were licensed to minorities (Ivy Group, 2000, citing Krasnow and Fowlkes, 1999). Until 1945, the FCC allocated licenses through non-competitive proceedings that offered few opportunities for new entrants, including minorities. In *Ashbacker Radio Corp. v. FCC* (1945), the Supreme Court held that the FCC was required to hold a comparative hearing to determine who should be awarded a broadcast license when there were mutually exclusive applications. The FCC's 1965 Policy Statement on Comparative Hearings adopted several factors that provided the applicant with an enhancement credit in the comparative hearing process, including: diversification of control, integration of ownership into management, proposed program service, past broadcast record, efficient use of frequency, and character (FCC, 1965).

In 1974 the D.C. Circuit in *TV9 v. FCC* held that as part of the FCC's mission to ensure that the broadcast spectrum serves the public interest, the FCC should take minority ownership into account. The D.C. Circuit stressed that other applicants' proposals "to present views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that has historically proven to be significantly influential with respect to editorial comment and the presentation of news." (*TV9*, 1974, p. 938). After TV9, the FCC in 1974 added the applicant's race as a factor to be weighed in the comparative hearing process used until 1993 (FCC, 1978; Bechtel v. FCC, 1983).

In 1978, the FCC recognized that despite its commitment to ownership diversity, minorities controlled only one percent of the 8,500 commercial radio and television stations then operating in the United States (FCC, 1978). The FCC's 1978 Minority Ownership Policy Statement recognized that "[a]cute under-representation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his audience." (p. 2).

The secondary market where incumbents sell their licenses has long been a significant source of station acquisition. The FCC's 1978 Policy Statement recommended that the FCC's Tax Certificate program be expanded to give private sellers an incentive to transfer their stations to minority owners, rather than trading their stations with incumbents in a tax-free exchange or selling to other buyers (FCC, 1978).[8] Between 1978 and 1995 the FCC granted 356 tax certificates ─ 287 for radio, 40 for television and 30 for cable franchises ─ to promote minority broadcast and cable ownership (Ivy Group, 2000).[9] Tax certificates or the acquisition method (private sale, comparative hearing, auction, etc.) are not reflected in the CDBS database.

Pursuant to the Minority Ownership Policy Statement, the FCC approved distress sales to a minority applicant to allow a failing broadcaster or one designated for a license revocation hearing to transfer its license to a minority-controlled company, instead of losing its license at a FCC revocation hearing or for failure to provide broadcast service. The FCC approved few distress sales, granting only 42 between 1978 and 1994, so they were not a significant or reliable point of entry since (Media Access Project, 1995).

While many minority broadcasters acquired their first license through the comparative hearing, tax certificate, and distress sale processes, the vast majority of FCC licenses allocated between 1970 until the adoption of auctions in 1993 were awarded by non-competitive applications for construction permits for a new license (Baynes, 2004; KPMG, 2000). Comparative hearings distributed about 39% of FCC licenses between 1970 and 1993. During that time period, “2,437 licenses were awarded by comparative hearing,” while “6,178 licenses were awarded through singleton applications for construction permits or licenses where only one applicant qualified under the FCC’s rules applied” (Baynes, 2004; KPMG, 2000). While comparative hearings created opportunities for some new licensees to commence broadcast service, many more licenses were awarded through non-competitive processes.

Concurrent with the 1978 Minority Ownership Policy Statement, the FCC expanded the AM radio band (Ivy Group, 2000). Twenty-four of the 324 minority radio owners in mid-2009 acquired their *first* station among those they still control today in 1978 or 1979 through the FCC’s AM Expanded Band Proceeding. Nine are still single station owners whose sole radio license is the Expanded Band station obtained in 1978 or 1979. More than 30 years later, 80% of those minority-controlled Expanded Band stations air minority-oriented formats.

Radio One and Multicultural Broadcasting both received their first licenses through the Expanded Band proceeding, creating their entry point and catalyst for growth. Only three minority broadcasters control more than 25 commercial radio stations in 2009. African-American owned Radio One controls 52 commercial radio stations; Asian-American owned Multicultural Broadcasting controls 43 radio stations, 15 of which it acquired from the bankruptcy of formerly Hispanic-owned Radio Unica in 2004 (BusinessWire, 2004); and South-Asian American controlled SS Holdings owns 43 stations. African-American owned AccessOne Communications obtained its first license through the Expanded Band Proceeding and in mid-2009 controls 17 commercial radio stations and two television stations.

Minorities acquired 184 commercial radio stations in 1980 or earlier, including the 26 stations acquired through the Expanded Band proceeding in the 1978 and 1979. Of the 324 minority owners of commercial radio stations in 2009, 126 or 38.8% acquired their licenses in

1980 or earlier, mostly in the years between the FCC's 1978 Minority Ownership Policy Statement and 1980. Twenty-four minority commercial broadcasters entered between 1981 and 1985. In total, 150 or 46% of those minority owners who still control commercial radio stations in 2009 acquired their first license before 1985.

Among minority-owned commercial broadcasters who still hold their station licenses in mid-2009, 11 entered between 1986 and 1990, acquiring 28 licenses. Between 1990 and 1995, 11 more minority broadcasters entered, also obtaining 28 licenses they still hold today. In the late 1980's through 1990, the FCC increased by 700 the number of FM broadcast stations through its 80-90 Docket initiated in 1985 (FCC, 1985). Most of those stations operated with limited power or during limited hours, constraining their reach and revenue potential (Hunsaker, 1994, p. 22). While some minorities entered broadcasting through comparative hearings held for the award of those 700 licenses, the CDBS database provides little information on the proceedings through which the licenses were obtained during this time period. Additional research into the FCC's archives and comparative hearing records would be necessary to determine how many of the 700 licenses the FCC authorized in the 80-90 docket were awarded to minority owners.

The laws restricting national and local multiple ownership of radio stations were conducive to minority entry during this time period (Hammond, 2008). From 1953 to 1985, FCC rules permitted common control of no more than seven FM radio stations, seven AM radio stations and seven television stations nationally and *one* station within a local market (Ivy Group, 2000). This permitted single station owners to enter unconsolidated markets and establish a foothold for service that many minority broadcasters rely on today. In 1985 the FCC raised the national ownership cap to 12 AMs, 12 FMs and 12 TV stations. In 1992 the FCC permitted broadcasters to control two or more stations in medium sized markets with 15 or more radio stations, as long as their combined audience share was below 25%.

Most of today's minority commercial radio broadcasters entered during this period of relatively unconsolidated markets and FCC policies that took minority ownership into account to determine license assignment in the public interest. Of the 324 minority commercial radio *owners* in mid-2009, 172 or 53% were awarded their *first license prior to the 1996 Act*. Nearly 35% or 285 of the 815 minority commercial radio *stations* still held in mid-2009 were obtained before the 1996 Act. Fewer new minority owners who still hold their licenses in mid-2009 *entered* the commercial radio field after 1996, compared to those who entered between 1978 and 1995.

The year preceding the Telecommunications Act's passage saw two significant developments that affected minority ownership, one legal and the other legislative. The Supreme Court imposed a strict scrutiny standard of review on federal programs taking race into account in *Adarand v. Pena* in 1995. Other government agencies, such as the U.S. Department of Transportation, whose program was challenged in *Adarand*, conducted studies to discern whether there was a basis for programs that considered race as a factor in contract awards, and successfully defended their program (*Adarand v. Slater*, 2000). The FCC commissioned several studies on minority ownership and market entry barriers in the late 1990s and published most of those studies on the eve of President George W. Bush's election (Ofori, 1999; Ivy Group, 2000; KPMG, 2000; Bachen, Hammond, Craft 2000; Ernst & Young, 2000; KPMG, LLP, 2000). The FCC did not initiate a request for comments or a rulemaking concerning the studies' evidence and findings, and instead, switched to race neutral rules (Baynes, 2004). In 1995, Congress also repealed the tax certificate program that encouraged sales to minorities, although incumbent broadcasters were still allowed to engage in tax-free exchanges that deferred capital gains.

Since the 1996 Act's passage, minorities obtained 521 commercial radio licenses they still control today. Between 2001 and 2005, the FCC licensed 241 commercial radio stations to minorities, marking the largest expansion of minority radio *station* ownership. Consolidation characterized this time period in the radio industry, although most minorities remained single station owners. That trend continued from 2006 to 2008, when 126 stations were licensed to minorities. At the same time, many minorities sold their stations, finding it unprofitable to broadcast in consolidated local, national, and regional markets (Ivy Group, 2000).

In 2007, the FCC auctioned 120 FM construction permits which were previously awarded for free. The FCC offered "designated entity" bidding credits in that auction based on the bidder's revenues. In 2009, the FCC auctioned more FM construction permits. The CDBS database does not provide a means to search for construction permits obtained through the auction process. This study found 24 construction permits currently pending for minority owners, some of which were obtained in auctions. This report recommends that the FCC synch the auction and media bureau databases to enable identification of minority auction participants and winners, and monitor their success in transforming construction permits into viable stations.

This report recommends that as part of the FCC's evaluation of its broadcast ownership rules, the FCC must examine its auction rules now used to assign construction permits. Such a unified analysis would combat the FCC's practice of fractured rulemakings that do not consider all relevant issues as a whole. Despite the Third Circuit's remand of the FCC's 2002 ownership rules and order to consider minority ownership issues at the same time as other broadcast rules, the Commission analyzed minority ownership separately from the newspaper-broadcast crossownership rules and other consolidation issues (Prometheus, 2004, FCC 2008, Bachen, Hammond, Sandoval, 2007). The FCC must not replicate that pattern in its 2010 analysis of the broadcast rules and should concurrently consider the effect of auctions on minority broadcast entry.

As of August 2009, only 58 new stations were licensed to minority commercial radio operators during 2009. The 43 stations DMG transferred to SSH accounts for more than 74% of the minority radio stations acquired in 2009. The broadcasting industry as a whole saw a dramatic decrease in station deals in 2009 as lenders froze lines of credit or refused to extend credit to new borrowers. Decreases in stock prices and uncertainty about the value of radio stations paralyzed equity and debt markets.

Between 2007 and 2009, 63 minority-controlled radio stations were sold and 21 stations are the subject of a pending sale. Completed sales are not counted in the 815 minority-owned stations in 2009. Some stations were sold in bankruptcy, while others were a sale of all or some of the company's radio licenses. The FCC should improve its databases to facilitate longitudinal analysis to determine the significance of this level of station sales over time, across all broadcasters, and the effect of these sales on service to the community and competition.

F. The Link Between Minority Radio Ownership and Content

1. Spanish, Urban, Asian, Gospel and Other Minority-Oriented Programming

The Supreme Court has recognized that broadcasters are given broad editorial discretion to determine the content of their programs and schedules, consistent with their mandate under the Communications Act of 1934 to serve the public interest (*FCC v. League of Women Voters*, 1984). In mid-2009, 72.5%, or 591, of the 815 minority-owned stations air minority-oriented formats: Spanish, Urban, Urban News, Asian, Ethnic and Minority-oriented Religious formats such as Gospel and Spanish-Christian. If the 24 silent minority-owned stations are eliminated, 74.7% of all minority-owned stations broadcasting programming air minority-oriented programming. This pattern refutes Justice Sandra Day O'Connor's assertion in *Metro Broadcasting v. FCC* (1990, p. 617) that the proposition that minority ownership contributes to diversity is based on stereotypes. The correlation between minority radio ownership and diversity in program service is robust.

These findings are consistent with the Free Press 2007 study which found that two-thirds of minority radio broadcasters aired minority formats (Turner, 2007). Several studies using different methodologies and examining different time periods have reached the same conclusion (Congressional Research Service, 1987; Dubin and Spitzer, 1994; Siegelman and Waldfogel; Bachen, Hammond, Craft, 2000). This pattern of a nexus between minority radio ownership and content has been repeated for more than 30 years. Absent government compulsion to offer any particular type of broadcast format, seventy-four percent of minority commercial radio owners actively broadcasting choose to do so in 2009.

Spanish is the most popular format among minority commercial radio owners in mid-2009, airing on 291 or 35.7% of the 815 minority-owned radio stations. Urban, African-American targeted formats, are broadcast on 135 minority-owned commercial radio stations. Six of those stations broadcast an "Urban News/Talk" format, airing a News/Talk format addressing the African-American community's concerns. Offering a different viewpoint from what Russell (1995) calls the "dominant gaze," Urban radio has created and supported an African-American "public sphere" where news of the day is highlighted from an African-American perspective (The Black Public Sphere, 1995; Folami, 2007). Likewise Spanish radio creates a “counterspace” on the radio dial where broadcasters and listeners can use Spanish to communicate news, public affairs and culture (Sandoval, 2008, Patton, 2006).

Nine companies controlled by Native Americans and five Native American tribal governments operate commercial radio stations programmed in a “General market” format, primarily Country. Examination of data on a station’s audience composition, if reported for such stations, would reveal whether Country is a popular format with Native Americans living in areas where those stations broadcast. Programming in Country also makes these stations eligible for local, national, and regional buys targeted at Country audiences, a large market since it is the nation’s second most popular format and was for decades the nation’s number one radio format (Arbitron, 2008).

Format alone does not tell the story of a station’s service to its community of license, including minority-group listeners. Although the radio station run by the Navajo Nation programs in a Country format, their Website indicates that they deliver news and information in both English and Navajo. Their DJs teach the Navajo “Word of the Day” on air to reinforce tribal members Navajo language skills and share their language and culture. Bachen, Hammond, and Craft (2000) highlighted similar contributions to news and public programming by minority owners in their study commissioned by the FCC.

Twenty-eight of the 815 minority-owned full power radio stations were programmed to serve Asian communities, airing Korean, Chinese, and other Asian formats. Arbitron (2009) recently started tracking Chinese radio formats and reported that audience members in New York and Los Angeles spend more than 16 hours each week listening to Chinese radio programs.

Fourteen stations broadcast in other minority formats such as programming provided through “brokered” programming agreements, whereby different people rent time from the radio station. Brokered programming stations include a mix of Asian programming, including South Asian programming, Spanish, and other minority-language or oriented programming.

Scholars have debated about whether to classify stations programmed in Religious formats as minority-oriented or majority-oriented formats (Ofori, 1999). Arbitron distinguishes between Gospel and Religious formats and classifies Gospel as a format targeted at African-Americans (Arbitron, 2008b). This study classifies Gospel as an African-American- targeted format. This study categorizes Spanish Religious stations as both Spanish and minority religious stations, including their numbers in both categories, but subtracting that duplication from the calculation of total minority-formatted stations.

144 minority-owned stations air Gospel and Spanish Christian programs. Minority-religious programs are the second most popular format among minority-controlled commercial radio stations after Spanish. Of those stations, 123 offer Gospel programs designed to inspire African-American communities, while 21 air Spanish religious formats, ministering to the Latino community. Some Urban stations air a Sunday "Gospel Brunch," but are counted as Urban for this study since that is their predominant format.

WFLT AM in Flint, Michigan airs Gospel programming because they felt "the African-American community needed a voice, and a vehicle to be heard" (WFLT AM Website). WFLT's station is designed to provide a "seat on the front pew of the African-American church—the historical platform for all social and political change." WFLT's mission reflects the desire of many minority broadcasters to interact with their listeners as members of the community, not just as consumers to be commodified as an audience and sold to advertisers (Gandy, 2000; Ang, 1991; Webster and Phalen, 1994).

Many of the 18 stations that are silent for financial reasons aired Spanish formats and may have aired other minority-targeted formats before the economy made their operation unfeasible. Other stations are silent for technical reasons as they upgrade their towers or other facilities. Thus, minority owners may have planned to offer even more minority programming than these numbers suggest, but were hampered by the economic downturn, their relatively small size and commensurately fewer resources.

2. Minority Commercial Radio Owners and General Market Formats

Of the 815 minority-owned full power radio stations, 183, or approximately 22.4%, of the 815 minority-controlled radio stations aired General Market formats. Analysis of audience composition data would be helpful to determine if minority radio broadcasters are largely serving minority audiences even when they choose a General Market format such as Smooth Jazz. Detailed audience composition data are available only through private research companies for thousands of dollars and do not include information for all stations, particularly for small groups or single stations.

Some of the minority radio owners who air general market formats may do so to escape advertising practices that exclude minority formats from consideration for advertising buys or pay broadcasters offering minority formats or serving minority communities less (Ofori, 1999; Napoli, 2002; Reed-Huff, 2006). Napoli (2002) found that when more than 50% of a broadcaster's audience was constituted by racial or ethnic minorities, the broadcaster earned less in advertising revenue relative to its share of audience ratings. The FCC in 2008 barred "No Urban Dictates" and "No Spanish Dictates," the practice of excluding radio stations from advertising buys based on their format (FCC, 2008, Ofori, 1999). These advertising practices yield less revenue for the broadcaster, making it more difficult and expensive to raise capital or secure debt, leaving less reserve for hard economic times, and may discourage service to communities desiring these formats.

Justice O'Connor espoused a "market" view of broadcasting in her dissent in *Metro Broadcasting v. FCC* (1990), questioning whether minority ownership contributes to diversity because "the market shapes programming to a tremendous extent" (p. 626). In the face of advertising practices that create economic disincentives to broadcast in formats designed to appeal to minority audiences, more than 74% of minority broadcasters who air programming offer minority-targeted formats. This signals that the nexus between ownership and content transcends "the market."

III. Reflections on Collaborative Research

This study was greatly enhanced by the collaboration of its research partners: the Minority Media and Telecommunications Council, directed by David Honig; Professor Catherine Sandoval and Professor Allen Hammond, IV, both of Santa Clara University School of Law. To identify research questions based on issues critical to minority broadcasters and the communities they serve, MMTC reached out to its members in 2008 and 2009. Professors Sandoval and Hammond worked with the National Association of Black Owned Broadcasters (NABOB), the Spanish Broadcasters' Association (SBA) and experts in the field, and examined relevant scholarly work, studies and comments submitted to the FCC on minority broadcast ownership.

Repeated themes from this outreach included: the importance of the tax certificate program to enable minority broadcasters to obtain their *first* radio license; the critical role of that *first* license and prevailing FCC licensing and consolidation policies in broadcast entry; and the consequences of the deepening recession. The recession exacted a toll on both the communities broadcasters serve and their advertising mainstays: automotive, retail, banking and real estate. This recession's lingering effects are seen in the 18 minority-owned stations that are silent for financial reasons in 2009, and the increasing number of station owners filing to bankruptcy.

This process underscored the need for collaborative research to extend beyond a partnership between the research team members and to include collaboration with the community of experts, scholars and businesses in the field to identify research questions relevant to the public interest. This outreach guided our research and led to this study's examination of the largely unexplored research question about entry into commercial broadcasting. Professor Sandoval's inquiry answered that question by mining the FCC database, application by application, to find out when broadcasters acquired their licenses, particularly their first license among those they still control.

The biggest challenge for our collaborative research efforts was and remains the way the FCC collects and reports data. The FCC's highly inefficient, incomplete and burdensome system frustrates analysis and monitoring of important trends. Critical issues such as the link between licensing and consolidation policies and minority broadcast entry, as well as the fate of small and minority broadcasters during the recession, are hidden in the FCC's labyrinthine databases. Improving the ability to search, sort, examine and analyze that information will enhance the ability of the public and the FCC to determine whether the FCC's broadcast policies serve the public interest.

IV. Conclusion

The law, as manifested by statutes and FCC regulations, has profoundly shaped the broadcast media and its power to create, project, and disseminate news and images (Folami, 2007; Coombes, 1999). The commercial broadcast ownership structure is now characterized by massive consolidation which affects service in the vast majority of local markets. At the other end of the spectrum are the minority owners, most of whom control a single station.

The FCC must consider the effect of its structural rules regarding multiple ownership and the programs it once implemented to encourage minority ownership in designing license allocation and assignment processes, including auctions and broadcast rules. It should consider this study's analysis of the effect of its licensing and consolidation policies on minority entry and exit as it evaluates broadcast ownership rules in 2010. It should commission additional studies on the role of consolidation policies in minority and small business entry and exit in broadcasting. It must also commission and examine access to capital studies, analyze the effect of auction rules on minority ownership, and weigh those findings in its rulemakings. It should examine the financial barriers to building construction permits and determine whether the FCC can make their completion more financially viable. The FCC must recognize the secondary market's importance to broadcast ownership and examine methods to encourage transactions with minority buyers such as tax certificates that would level the playing field with incumbents able to engage in tax-free exchanges.

The FCC must also make its database more robust to analyze trends in stations going dark for financial reasons, bankruptcies, liquidations, and lender workouts. This study's findings about the number of minority commercial broadcast owners in dire financial status cries out for more examination of this issue across time and across the spectrum of broadcast owners. The FCC must also make it easier to identify and examine the data they already collect about ownership characteristics including race, ethnicity, gender and voting control, none of which are currently searchable. They must also improve the ability to search the Application database, disaggregating categories such as bankruptcies and stations dark for financial reasons.

This study confirms that minority owners overwhelmingly provide minority-oriented content that contributes to diversity and the public interest. In 2007, the Supreme Court cited with favor the *Bakke* decision's rationale that diversity may be a compelling state interest (which can survive strict scrutiny as its serves forward-looking values underlying diversity and the First Amendment) where race is part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas and viewpoints" (*Parents Involved*, 2007, p. 703 citing *Bakke*, 1978, p. 330). Minority broadcasters provide that exposure through news, public affairs, and entertainment programming relevant to minority communities. The FCC should recognize minority broadcasters' contributions to our nation's democratic dialogue and analyze how its media ownership rules can ensure that minority broadcasters and the communities they serve thrive in the twenty-first century.

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[2] Since 1998 the FCC has required those with an attributable interest in a broadcast station to provide information on their gender, race and ethnicity, voting and equity control of the license. The FCC defines minority owners as African-American/Black, Hispanic, Native American or Alaska Native, Asian-American or Asian-Pacific Islander (FCC, 2009, *Promoting Diversification*).

[3] Turner included Border Media and Urban Radio in the FreePress 2007 report on minority-controlled commercial radio stations. Border Media was founded by a Hispanic, Tom Castro,

who acquired his first license in 1979 and then built up El Dorado Broadcasting, which led the way to the creation of Border Media after El Dorado's sale (Campo Flores, 2004). Border Media's President was Jeff Hinson, a Hispanic. The latest form 323s Border Media filed indicate that minorities no longer controlled 50% of the votes for the 25 stations it transferred to the company's lenders in 2009 as a debt settlement or for the 4 stations Border Media retained. Likewise, Urban Radio's 13 stations are included in this report as minority-owned although minorities control less than 50% of the voting stock due to substantial equity investments by Goldman Sachs and others investors which carried commensurate voting rights. To track the stations FreePress identified in 2007 as minority owned, including Border Media and Urban Radio, this report classifies both companies and their stations as minority-owned.

[4] A 50-50% partnership arguably creates negative control by either the minority or the non-minority shareholder; the remaining shareholders cannot approve a major transaction without a majority, necessitating the support of the shareholder(s) who controls the other 50% of the votes. This study follows the FCC's past practice of requiring greater than 50% voting control to define the licensee as a minority. The 3 stations controlled by The Milwaukee Radio Alliance, a partnership between African-American All Pro Broadcasting, which obtained its first radio license before 1980, and Shamrock Communications; the 2 stations controlled by Buckalew Media, a 50-50% partnership between a minority and non-minority husband and wife; the station controlled by John and Katrina Ostlund, a minority and non-minority husband and wife; and 6 stations controlled by Glades Media and Key Media, a partnership between Robert Castellanos and James Johnson, a minority and non-minority, respectively, are excluded from this report's count of minority owners. The Milwaukee Radio Alliance deal is an example of how a minority

owner leveraged his early control of a radio station into a partnership with a large commercial broadcaster.

[5] The 50% or more voting control threshold excludes Bustos Media Group (BMG) from this report's count of minority-owned stations and was BMG not included in the FreePress 2007 report. Amador Bustos, a Mexican-American, is BMG's President, founder, and is in charge of the company's day-to-day operations. Three sets of shareholders each have one-third voting control over BMG, and two of those shareholder groups are not minority controlled (KDDS AM form 323). The Bustos family obtained their first controlling interest in a radio station in 1992 through an FCC tax certificate designed to encourage the licensee to sell its station to a minority company (Ivy Group, p. 107). Amador and Rosalie Bustos control three stations they own through Bustos Media LLC and program in Vietnamese that are counted as minority-owned in this analysis (KZSJ AM, KREH, AM and KTXV AM).

[6] Non-commercial educational stations are excluded from this analysis because they have different eligibility requirements and licensing procedures than commercial radio stations. Only non-profit corporations and educational institutions are eligible for non-commercial educational station licensees (FCC, 2008, *The Public and Broadcasting*, 47 CFR 73.504). Three stations are notable regarding their status as commercial or non-commercial. KBMI FM was a commercial station sold by Hispanic-controlled Border Media in 2008 and the new owner has since filed an application for the FCC to convert the station's status to non-commercial. This report counts KBMI FM as sold by a minority-owner. The FCC Station Status database classifies KRGE AM owned by Christian Ministries of the Valley as commercial but its 323 ownership form filed in March 2009 lists that station as non-commercial. No request appears in the application database to convert that station from a commercial to non-commercial status. The same Hispanic-

controlled entity holds the license so it is included in this report's count of minority-controlled commercial stations. The 2009 form 323 for WARR AM lists the station as non-commercial, but there is no pending application to convert its status from commercial to non-commercial so it too is included in this report. The FCC should ensure that applicants indicate the proper commercial or non-commercial status on their ownership forms and permit non-commercial filings only where the FCC has designated the station as such or granted an application to convert the station's status.

[7] These numbers exclude minority-owned stations in Puerto Rico. The Island's broadcast traditions created many opportunities for Hispanic broadcasters to serve their communities, factors not representative of the mainland.

[8] Congress had previously delegated authority to the FCC to issue Tax Certificates where "necessary and appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations" (Id., n. 19 citing 26 U.S.C. §1071).

[9] To qualify for a tax certificate the minority buyer had to control 50.1% of the votes of the entity acquiring the licenses and 20.1% of the equity (Ivy Group, 2000).