

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re Applications of )  
FAMILY BROADCASTING, INC., Assignor, ) BALH-20030304AAX  
and ) BALH-20030304AAW  
CALEDONIA COMMUNICATION CORPORATION, )  
Assignee )  
For Assignment of Licenses for WSTX(AM) and )  
WSTX-FM, Christiansted, VI )  
TO THE COMMISSION

**COMMENTS OF *AMICUS CURIAE* MINORITY  
MEDIA AND TELECOMMUNICATIONS COUNCIL**

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January 8, 2004

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## Summary

The Media Bureau has delivered the sharpest insult to all who love diversity. Without a word of analysis, regret or remorse -- or even recognition -- the Bureau has issued a decision that would nullify the FCC's only remaining minority ownership policy.

Until Daniel A. Huber, No. 1800BE-CJN (Media Bureau, October 27, 2003) ("Huber"), the imperative need to advance minority ownership was settled law. Twenty-six years ago, when it unanimously adopted the Distress Sale Policy and the Tax Certificate Policy, the FCC ended 50 years of spectrum segregation by providing a modest foothold for minorities on the airwaves. But with this decision, the Bureau would restore the anti-minority regulatory regime the Commission left behind in 1978.

Although the Bureau did not even acknowledge that it was nullifying the Distress Sale Policy, to a moral certainty that is exactly what it has done. Designation for hearing is the predicate for a distress sale; yet if Huber is affirmed, all wrongdoing serious enough to justify a hearing will actually make the seller ineligible for a distress sale. It is as though the Federal Golf Commission, too embarrassed to admit that it wants to ban golf, declares "oh, you can still play golf. You just can't use golf balls anymore."

We owe the Distress Sale Policy's birth in 1978 to the determination and moral strength of Chairman Richard E. Wiley, Chairman Charles D. Ferris, the National Association of Broadcasters and the Congressional Black Caucus. The Distress Sale Policy has survived Supreme Court review and placed about 40 stations in the hands of people of color. It has rapidly restored good service to millions of broadcast consumers, harmed no one, and saved the taxpayers the expense of trials and appeals in thirty adjudications. Without the Distress Sale Policy, we would not have enjoyed the birth of Radio One the nation's largest minority owned broadcast firm, whose 66 stations provide quality, diverse programming to millions of radio listeners.

Of the seven minority broadcast ownership initiatives that the FCC has ever administered, only two remained in effect a year ago: the Failing Station Solicitation Rule (“FSSR”) and the Distress Sale Policy. Then last June, without a whisper of prior notice, the FCC repealed the FSSR. Now the Bureau has issued a decision cutting the heart out of the Distress Sale Policy -- also without prior notice.

Huber is the pure antithesis of a well reasoned decision. About the value of minority ownership, it contains nothing. Nothing, too, is said about the importance of the Distress Sale Policy in promoting minority ownership, or about the Commission’s obligations under the Communications Act to promote diversity. The Bureau purports to “weigh” two factors that it neither measures individually nor compares side by side. The decision fails even to mention two key objectives of the Distress Sale Policy -- conserving resources by resolving contentious litigation, and enabling the public to receive the prompt restoration of service in the public interest.

For all its flaws as a radio operator, Family Broadcasting, Inc. has performed an extraordinary public service in standing up to the Bureau and seeking review. Family’s Application for Review inquires into the agency’s soul, testing whether the Commission really believes in walking the walk of diversity.

This is the rare case that justifies the predecisional debate contemplated by the Commission’s rule authorizing oral argument in a hearing case, 47 C.F.R. §1.277. After holding oral argument, the Commission should mince no words in entering a judgment of reversal.

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## **Introduction**

The Minority Media and Telecommunications Council (“MMTC”), by counsel, respectfully submits these comments as *amicus curiae* in the above-referenced matter.<sup>1/</sup> Leave to accept these Comments is respectfully requested. Pursuant to 47 C.F.R. §1.277, oral argument is respectfully sought. If 47 C.F.R. §1.115(f) (25 page limit) is applicable to *amici*, waiver of the same is respectfully requested in light of the extraordinary importance of the matter.

As a leading advocate for minority media ownership since 1986, MMTC represents 52 national organizations before the Commission on issues relating to minority participation in the media and telecommunications industries. MMTC operates the nation’s only minority owned and only nonprofit media brokerage, and it operates the Earle K. Moore Minority Legal Fellowship Program, which has trained 34 communications lawyers and law students since 1995.

To assist the Commission in its review of this matter, MMTC sets out the reasons why the decision below is wrong, inasmuch as it would essentially terminate the Distress Sale Policy<sup>2/</sup> and profoundly undermine the Commission’s efforts to promote diversity and competition.

In Huber, the Media Bureau, ultra vires,<sup>3/</sup> dismissed the above-captioned applications for

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<sup>1/</sup> The views expressed herein are the institutional views of MMTC and are not intended to reflect the individual views of its officers, directors or members. MMTC is not sufficiently familiar with the buyer and seller in the underlying transaction to express an opinion regarding their respective bonafides. MMTC is interested in this matter because of its likely impact on minority ownership and diversity generally.

<sup>2/</sup> The Distress Sale Policy was created in Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978) (“1978 Policy Statement”) and clarified in Clarification of Distress Sale Policy, 44 RR2d 479 (1978).

<sup>3/</sup> The Bureau lacked authority to issue a decision that rejects a distress sale, especially when the grounds relied upon would essentially end the Distress Sale Policy. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 861 (1982) (“1982 Policy Statement”) (Commission delegates authority to the Bureau “to process and grant those petitions that are consistent with Commission policy and do not involve novel questions of fact, law or policy in the area of distress sales.”) See also 47 C.F.R. §0.283(c) (2002) (requiring the Media Bureau to refer to the full commission “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”) Certainly this case could have been resolved under “existing precedents and guidelines” by granting the applications; however, the Bureau evidently regarded this case as presenting “novel questions” or it would not have articulated a new policy whose effect was to nullify the Distress Sale Policy. Accordingly, the Bureau should have referred the matter to the full Commission. Since the Bureau was without authority to issue Huber, the Commission should promptly vacate Huber irrespective of how it ultimately decides this matter on review.

distress sale relief. In doing so, the Bureau did not find that the threshold requirements for distress sale relief were unsatisfied. In particular, the hearing has not yet commenced,<sup>4/</sup> the buyer is qualified and is minority controlled,<sup>5/</sup> the price is shown by appraisals of the buyer and seller to be 75% or less of fair market value for the stations,<sup>6/</sup> and the parties have made a proper showing setting forth their bonafides, their negotiations surrounding the sale and a description of anything of value they exchanged.<sup>7/</sup> Nor did the Bureau address whether Distress Sale Policy has any inherent flaw, constitutional or otherwise.

The Bureau rendered two holdings:

Holding #1: The Distress Sale Policy “is not to be rigidly applied”;<sup>8/</sup> and

Holding #2: The “benefit of continued minority ownership of these stations” is outweighed by two factors:

- a. “the seriousness of Family’s misconduct,” specifically, that Family “repeatedly deceived the Commission, ignored Commission correspondence, operated both stations at variance from the terms of their authorizations, and repeatedly violated other Commission rules, including rules that are designed to protect the public from exposure to RF radiation.”<sup>9/</sup>
- b. “the Commission’s critical interest in deterring similar wrongdoing in the future[.]”<sup>10/</sup>

The factual background section of Huber suggests that Family could be regarded as a recidivist.<sup>11/</sup> Nonetheless, recidivism played no role in the final outcome of Huber. The

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<sup>4/</sup> 1978 Policy Statement, 68 FCC2d at 983.

<sup>5/</sup> Id.; see also Grayson Enterprises, Inc., 77 FCC2d 156, 165 (1980) (“Grayson”).

<sup>6/</sup> These requirements evolved in a series of four cases: Northland Television, 72 FCC2d 51, 54-58 (1979), Lee Broadcasting, 76 FCC2d 462, 464 (1980), Grayson, 77 FCC2d at 165, and Patrick Henry, 79 FCC2d 393, 395 (1980).

<sup>7/</sup> See KND Corp., 83 FCC2d 161, 165 (1980).

<sup>8/</sup> Huber, p. 3.

<sup>9/</sup> Id. The reason for this reference to the “seriousness of the misconduct” was not stated in Huber. From the underlying context, the Bureau had to be referring to specific deterrence, rather than some impermissible motive for regulation (e.g. revenge, or punishment for its own sake).

<sup>10/</sup> Id. Evidently this is a reference to general deterrence.

<sup>11/</sup> Huber, pp. 1-2.

conclusions section of the decision relies only on the types of misdeeds attributed to Family, rather than their frequency or numerosity.<sup>12/</sup>

In its deterrence analysis, Huber relies on a single case as precedent: Newsouth Broadcasting, Inc., 6 FCC Rcd 5047 (1991) (“Newsouth”). In Newsouth, the Commission denied a petition for distress sale relief where the errant licensee was a convicted drug dealer serving time in federal prison. Nonetheless, the Commission in Newsouth also assured the public that its decision “turns on the unique importance of this nation’s war against drugs.... Thus, in the vast majority of instances, we expect to continue to routinely to approve distress sales that otherwise meet the criteria of our distress sale policy.”<sup>13/</sup> Until Huber, Newsouth was the only case in which a hearing was designated but had not commenced, but distress sale relief was nonetheless denied.<sup>14/</sup>

On review in this case, the Commission should uphold Holding #1 -- that the Distress Sale Policy “is not to be rigidly applied.” Although Huber does not cite Grutter v. Bollinger<sup>15/</sup> or Gratz v. Bollinger,<sup>16/</sup> those recent Supreme Court decisions make it clear that a policy like distress sales must be applied on a case by case basis, taking into account the unique qualifications of the proposed purchaser. To conform with Grutter and Gratz, the Commission should invite the proposed assignee to provide a showing of how its ownership of WSTX-AM and WSTX-FM would advance the Commission’s diversity objectives.

However, the Commission should reverse Holding #2 because Huber’s deterrence analysis is illogical. The prospect of designation for hearing is already an extraordinarily powerful

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<sup>12/</sup> Huber, pp. 2-3.

<sup>13/</sup> Newsouth, 6 FCC Rcd at 5049 ¶6 (fns. omitted; emphasis supplied).

<sup>14/</sup> Distress sale relief is not available after the hearing commences. See Bartell Broadcasting of Florida, Inc., 45 RR2d 1329, 1332-33 (1979), Walton Broadcasting, 83 FCC2d 440, 443 (1980), Stereo Broadcasters, Inc., 74 FCC2d 543, 545 (1979) (“Stereo Broadcasters”), Cosmopolitan Broadcasting Corp., 79 FCC2d 16, 23 n. 29 (1980) and Golden Broadcasting Systems, Inc., 68 FCC2d 1099, 1109 (1978).

<sup>15/</sup> Grutter v. Bollinger, 123 S.Ct. 2325 (2003) (“Grutter”).

<sup>16/</sup> Gratz v. Bollinger, 123 S.Ct. 2411 (2003) (“Gratz”).

deterrent.<sup>17/</sup> Those considering whether they can get away with wrongdoing will observe a distress sale case and see what it holds out for the non-law abiding broadcaster -- the shame and expense of designation for hearing, the loss of one's career and professional standing, and the loss of at least one quarter of one's investment. It is inconceivable that the unavailability of distress sale relief could add more than a featherweight of additional deterrence.<sup>18/</sup> On the other hand, the unavailability of distress sale relief in cases involving relatively routine forms of misconduct nullifies the Distress Sale Policy entirely: after all, issues of equal or greater gravity than those in Huber figure in all hearing designation orders.

We set forth herein the history of the Distress Sale Policy and the current state of minority ownership. We next explain that Huber, if affirmed, nullifies the Distress Sale Policy, contravening Commission precedent and congressional intent. Finally, we dissect the Huber decision itself to show that although Bureau was correct in holding that the Distress Sale Policy should not be rigidly applied, the Bureau erred grievously in denying distress sale relief.

## **I. The State Of Minority Ownership**

A generation after the Distress Sale Policy was adopted, minority ownership stands at only 4.2% of radio stations and 1.5% of television stations -- and at only 1.3% of industry asset value.<sup>19/</sup> Further, thanks to two generations when the FCC licensed segregationists and imposed other irrational barriers to minority entry,<sup>20/</sup> minority owned stations tend to have technically

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<sup>17/</sup> See, e.g., Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344, 353 (D.C. Cir.), pet. for reh'g. denied, 154 F.3d 487, pet. for reh'g. en banc denied, 154 F.3d 494 (D.C. Cir. 1998)) (“[n]o rational firm -- particularly one holding a government-issued license -- welcomes a government audit.”)

<sup>18/</sup> Since hearing designation is such a powerful deterrent, the obvious way to generate even more deterrence would be to beef up rule enforcement and designate more hearings, rather than preventing new minority ownership in the few hearings that the Commission manages to designate these days.

<sup>19/</sup> MMTC, “The Disparity Between Minority and Nonminority Radio Ownership,” October 30, 2003, p. 1 (“Ownership Disparity”).

<sup>20/</sup> This history is detailed in the Comments of MMTC in MM Docket No. 01-317 (Radio Ownership), filed March 19, 2002, pp. 71-104.

inferior facilities<sup>21/</sup> -- a circumstance underscored by Chairman Powell's recent decision to lift the AM Freeze.<sup>22/</sup>

Minority ownership falls squarely within Congress' expectation that the Commission promote ownership diversity.<sup>23/</sup> Further, since 1985 minority ownership has been an essential

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<sup>21/</sup> See Ownership Disparity, supra (summarizing data on the second-class technical facilities of minority owned radio broadcasters). For example, as of 2001, a minority owned radio station was 43% more likely than a nonminority owned station to operate in the AM band. Further, among AM stations in 2001, minority owned facilities were 36% less likely than nonminority owned stations to operate between 540 and 800 kHz, and 29% more likely than nonminority owned stations to operate between 1410 and 1600 kHz. Id.

<sup>22/</sup> Lifting the freeze means that many AM station owners can increase power, operate at night, or move their towers closer to their audiences. When he lifted the freeze, Chairman Powell commendably recognized the need "to develop new, legally sustainable approaches that will improve employment and ownership opportunities for minorities and women in the media and telecommunications industries." "FCC Chairman Michael Powell Announces Opening of Application Window for AM Radio Service: Powell Highlights Strengthening of Minority-Owned AM Stations," FCC News Release, November 6, 2003.

<sup>23/</sup> Section 257 of the Telecommunications Act, 47 U.S.C. §257 (1996), expresses Congress' expectation that the FCC shall promote the "National Policy" of "diversity of media voices" and report triennially on "any regulations prescribed to eliminate barriers within its jurisdiction," 47 U.S.C. §257(a), (c) (1996). Section 257 is especially applicable to minority ownership issues. See 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (Statement of Rep. Cardiss Collins, the lead sponsor of Section 257:

while we should all look forward to the opportunities presented by new, emerging technologies, we cannot disregard the lessons of the past and the hurdles we still face in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace. I refer to the well-documented fact that minority and women-owned small businesses continue to be extremely underrepresented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

The Commission has also recognized Section 257's applicability to minority ownership. See 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (R&O), 13 FCC Rcd 23056, 23095-98 ¶96 (1998) (deciding to collect data on broadcast owners' gender and race in order to "determine accurately the current state of minority and female ownership of broadcast facilities, determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257...."), recon. denied on this issue (and granted in part on other issues), 14 FCC Rcd 17525, 17530 ¶17 (1999) (emphasis supplied).

Furthermore, Section 309(j)(3)(B) of the Communications Act requires the Commission to design its auction system so as to ensure that "news and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating

[n. 23 continued on p. 6]

component of structural ownership review.<sup>24/</sup> Minority ownership policies have also been deployed as a longstanding safety net for diversity when the Commission needed to justify structural deregulation<sup>25/</sup> and programming deregulation.<sup>26/</sup>

Of the seven minority ownership policies since 1973, only distress sales survive today:<sup>27/</sup>

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<sup>23/</sup> [continued] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women[.]” The Commission has recognized that it “has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry.” 1998 Biennial Regulatory Review -- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998) (seeking comment “on the relationship between these ownership limits and the opportunity for minority broadcast station ownership” (fn. omitted)). Section 309(j) is germane to distress sales because a license, revoked because of the unavailability of distress sale relief, is reissued through the auction process.

<sup>24/</sup> See Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O) [on reconsideration], 100 FCC2d 74, 94 (1985) (“1985 Multiple Ownership - Reconsideration”) (previous and subsequent histories omitted) (“our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.”) It was in this decision that the Commission adopted the Mickey Leland Rule, which provided that an interest of up to 49% in minority-controlled stations would not be subject to attribution with respect to two stations beyond the otherwise applicable national ownership caps. See p. 8 infra.

<sup>25/</sup> See, e.g., Revision of Radio Rules and Policies (R&O), 7 FCC Rcd 2755, 2769-2770 ¶¶26–29 (“1992 Radio Rules”), reconsideration granted in part and denied in part, 7 FCC Rcd 6387 (1992) (“1992 Radio Rules - Reconsideration”) (pointing to the existence of the tax certificate and distress sale programs in order to justify relaxation of the local radio ownership rules). See also Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission’s Rules (R&O), 102 FCC2d 548, 558 (1985) (“Clear Channels Repeal”), recon. denied, 4 FCC Rcd 5218 (1989) (holding that a “sounder approach” than eligibility criteria for new licenses is to use distress sales and tax certificates to promote minority ownership.) Only thirteen minority owned stations had been created under this policy when the FCC abandoned it in reliance on a “sounder” approach. See id. at 555.

<sup>26/</sup> See Deregulation of Radio (R&O), 84 FCC2d 968, 977 (“Deregulation of Radio”), recon. granted in part, 87 FCC2d 797 (1981), aff’d in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (reassuring the public that “[t]his proceeding leaves untouched...our minority ownership policies.”)

<sup>27/</sup> We are not counting the “cluster spinoff policy” adopted in the 2002 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (R&O and NPRM), 18 FCC Rcd 13620, 13810-12 ¶¶488-90 (2003) (“Omnibus R&O”), on appeal in Prometheus Radio Project v. FCC, 3d Cir. No. 03-3388 (oral argument scheduled February 11, 2004). This policy makes small businesses the eligible parties for purchasing radio clusters that must be broken up if sold. However, apart from its limitation to radio and the infrequency with which it could be used, the policy is of no use in advancing minority ownership because its beneficiary class is 95.5% nonminorities -- hardly different from the 95.8% nonminority ownership of radio stations generally. See MMTc Petition for Reconsideration in MB Docket No. 02-277 (filed September 4, 2003), p. 8.

1. The Distress Sale Policy, at issue in this case.
2. The Tax Certificate Policy, created in 1978 in the same decision that gave birth to the Distress Sale Policy. 1978 Policy Statement, 68 FCC2d at 983. In its seventeen year run, the Tax Certificate Policy was responsible for over 200 minority owned stations. The Tax Certificate Policy was repealed in Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995).
3. The Comparative Hearing Policy, judicially imposed in TV-9, Inc. v. FCC, 495 F.2d 929, 935-38 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974)) (“TV-9”), gave comparative credit to minority owners who were integrated into management.<sup>28/</sup> Comparative hearings were frozen after Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which found that the Commission had not rationally justified its prediction that better broadcast service is provided when owners are integrated into management. See FCC Freezes Comparative Hearings (Public Notice), 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689 (1994), further modified, 10 FCC Rcd 12182 (1995). The Comparative Hearing Policy was entirely nullified by the Balanced Budget Act of 1997, which expanded the Commission’s competitive bidding authority under Section 309(j) of the Communications Act to add provisions governing auctions for broadcast services. Pub. L. No. 105-33, 111 Stat. 251 (1997). No minority ownership initiative has replaced the Comparative Hearing Policy.<sup>29/</sup>

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<sup>28/</sup> The Commission briefly considered replacing comparative hearings with lotteries, but it soon abandoned the idea. Amendment of the Commission’s Rules to Allow the Selection from Among Competing Applications for New AM, FM and Television Stations by Random Selection (Lottery) (Order), 5 FCC Rcd 4002 (1990).

<sup>29/</sup> In the wake of the 1997 Balanced Budget Act, the Commission sought comment on a proposed system of bidding credits that included credit for minority ownership. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (NPRM), 12 FCC Rcd 22363, 22397-22404 ¶¶83-97 (1997). However, the Commission decided instead to adopt a “new entrant” bidding credit, even while acknowledging that “the record regarding small businesses is not well developed and existing size standards seem ill-suited to the broadcast auction context.” Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses (NPRM), 13 FCC Rcd 15920, 15595 ¶190 (1998). In the hope that it could build a record to justify a minority bidding credit, the Commission instructed the staff “to complete expeditiously all necessary Adarand studies, and we anticipate the release of a further notice considering designated entity issues in the broadcast context following completion of these studies.” Id. The Section 257 studies were released over three years ago. See Office of the Chairman, “Studies Indicate Need to Promote Wireless and Broadcast License Ownership by Small, Women- and Minority-Owned Businesses” (Press Release), 2000 FCC WL 1808326 (December 12, 2000). Yet there has been no further NPRM considering designated entity issues in broadcasting.

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4. The Clear Channel Eligibility Criteria, adopted in Clear Channel Broadcasting in the AM Broadcast Band (R&O), 78 FCC2d 1345, 1368-69 (1980) (“Clear Channels”), recon. denied, 83 FCC2d 216 (1980), aff’d sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982) made minorities, noncommercial broadcasters and daytimers the eligible parties to seek certain new AM facilities. This policy was repealed in Clear Channels Repeal, 102 FCC2d at 558. See p. 6 n. 25 supra.
5. The Mickey Leland Rule, adopted in 1985 Multiple Ownership - Reconsideration, 100 F.2d at 94, provided that an interest of up to 49% in minority controlled stations would not be subject to attribution with respect to two stations beyond the otherwise applicable national ownership caps. It was modified in 1992 in 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6390-91 ¶¶17-18 (three-station bump-up from the new limits of 18–18–18) but was rendered moot after Congress required the Commission to abandon numerical national caps on station ownership. Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), 11 FCC Rcd 12374 (1996).

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<sup>29/</sup> [continued] Meantime, the current system of bidding credits is unlikely to promote minority ownership, for three reasons. First, not being race conscious or even based on disadvantage, they are quite dilute, much like the cluster spinoff policy described at p. 6 n. 27 supra. Second, the broadcast auction rules are set up to invite gamesmanship and fraud. See Petition for Clarification in MM Docket No. 97-234 (Competitive Bidding for Commercial Broadcasting and ITFS Licenses) (filed April 19, 2001 and disregarded by the Commission), re-filed in Comments of MMTTC in MM Docket No. 95-31 (Comparative Standards for Noncommercial Educational Applicants) (filed May 15, 2002 and again disregarded by the Commission); re-filed again in MMTTC Petition for Reconsideration in MB Docket 95-31 (filed June 16, 2003) (pointing out that as the auction rules are written now, a company can claim to be entitled to bidding credits, then immediately change its structure to remove the attributes that entitled it to the bidding credits, and still use the undeserved bidding credits in the auction). Third, there are not likely to be many commercial auctions for desirable facilities, since noncommercial operators will first have an opportunity to pick over the available allotments. See Reexamination of the Comparative Standard for Noncommercial Educational Applicants (Second R&O), 18 FCC Rcd 6691, 6695-96 ¶¶11-12 (2003) (creating broad exemption for NCE stations from competitive bidding).

<sup>30/</sup> Minority ownership figured in two large merger cases which required waivers of the antitrafficking rules for certain of the stations being acquired: Miami Valley Broadcasting Corp., 78 FCC2d 684 (1980) (“Miami Valley”) and Combined Communications Corporation, 72 FCC2d 637 (1979), recon denied, 76 FCC2d 445 (1980) (“Combined Communications”). In Miami Valley, 78 FCC 2d at 720, proposed minority ownership of five spinoff properties was a contributing factor in the Commission’s decision to grant an antitrafficking waiver in connection with the GE-Cox merger (the merger ultimately failed to close). In Combined Communications, 72 FCC2d at 654 and 76 FCC2d at 448–449, the spinoff of a television station to a minority broadcaster was a contributing factor in the Commission’s decision to approve the Gannett/Combined Communications merger (which did close).

6. Antitrafficking Waivers for sales to minorities, proposed by NTIA Director Henry Geller in 1977, were contemplated in Petition for Issuance of Policy Statement, 69 FCC2d 1591, 1596-97 (1978) (“NTIA Petition”). See id. at 1597 (“[t]he entry of minority ownership is an independent policy goal further supporting such a waiver request, and conceivably might tip the balancing of other considerations in a close case, but it would be inappropriate to suggest a general approach to waiver requests which involve such competing policy interests.”)<sup>30/</sup> The antitrafficking waiver policy became moot when the Commission abandoned its antitrafficking rule. Amendment of Section 73.3597 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control), 52 RR2d 1081 (1982).<sup>31/</sup>
7. The Failing Station Solicitation Rule (“FSSR”), although not a race-conscious policy, was adopted in 1999 with the goal of ensuring that “minorities and women interested in purchasing a station will have an opportunity to bid,” thus facilitating minority access to deal flow. Review of the Commission’s Regulations Governing Television Broadcasting, 14 FCC Rcd 12903, 12937 ¶74 (1999) (subsequent history omitted). Last summer, without prior notice, the Commission repealed the FSSR. Omnibus R&O, 18 FCC Rcd at 13708 ¶225.

Thus, the Distress Sale Policy now stands as the only remaining FCC initiative designed to foster minority ownership. Yet the consequences of nullifying the Distress Sale Policy would extend far beyond minority ownership. Program deregulation and structural deregulation were predicated on the existence of minority ownership protections, including the distress sale. With the minority ownership policies gone, program deregulation and structural deregulation may have to be reversed.<sup>32/</sup>

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<sup>31/</sup> In NTIA Petition, the Commission also held out the possibility of waivers of the multiple ownership rules to promote minority ownership. Id. at 1596-97. Subsequently, the Commission has on occasion taken minority ownership into account as a factor in whether to grant temporary waivers of the structural rules. See, e.g., Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd 5012, 5036 ¶47 (1996) (weighing favorably, as a factor in support of a one-to-a-market rule waiver in connection with the CBS/Infinity merger, the fact that Infinity “has already filed an application to assign one of the stations it will divest to a minority-controlled entity”); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (holding that Viacom's proposal to seek out minority buyers for two radio stations to be spun off from its merger with Paramount “would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver.”) However, the Commission has never articulated a general policy on this subject. In the Omnibus R&O, without discussion or analysis, the Commission postponed consideration of this proposal until it issues a notice of proposed rulemaking on minority and female ownership. Id. at 13636 ¶50.

<sup>32/</sup> See, e.g., Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (“[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears,” citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

## II. The History and Operation Of The Distress Sale Policy

In 1977, Chairman Wiley created the Minority Ownership Task Force to recommend how the Commission could create incentives to advance minority ownership in the nation's most influential industry. The Task Force Report concluded:

Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8,500 commercial radio and television stations currently operating in this country. Acute underrepresentation 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. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.<sup>33/</sup>

After the Task Force released its report, the Commission unanimously adopted the Tax Certificate Policy and the Distress Sale Policy.<sup>34/</sup> These policies were endorsed by the NAB, the Congressional Black Caucus and the civil rights community. The Commission held that

[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection or programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.<sup>35/</sup>

Distress sales are straightforward. At any time before the hearing begins, the respondent may petition for distress sale relief.<sup>36/</sup> Such a petition must be accompanied with an application to assign the license to a qualified purchaser at a price that does not exceed 75% of fair market value.<sup>37/</sup> The station's value is established through appraisals.<sup>38/</sup>

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<sup>33/</sup> FCC Minority Ownership Task Force, *Minority Ownership Report (1978) (Summary)* (emphasis in original). When the Distress Sale Policy was adopted in 1978, minorities comprised about 20% of the population. The Census Bureau projects that the population in 2010 will be 13.3% African American, 5.1% Asian American and 14.6% Hispanic. U.S. Census Bureau, "Population Estimates Program, Population Division: Annual Projections of the Total Resident Population, 1999 to 2100" (1999).

<sup>34/</sup> 1978 Policy Statement, 68 FCC2d at 983.

<sup>35/</sup> Id. at 981.

<sup>36/</sup> 1978 Policy Statement, 68 FCC2d at 983.

<sup>37/</sup> See cases cited at p. 2 n. 6 supra.

<sup>38/</sup> Id.

Since 1978, there have been approximately 30 distress sales, saving the Commission millions of dollars in litigation costs and placing approximately 40 stations in the hands of qualified minority-owned broadcasters.<sup>39/</sup> These 40 stations represent less than one-tenth of one percent of the approximately 54,000 renewal applications processed since 1978.

Nonetheless, despite its relatively infrequent application, the Distress Sale Policy has contributed substantially to diversity. Most famously, in 1980, the Distress Sale Policy made possible the birth of the company now known as Radio One.<sup>40/</sup> Today, Radio One is the largest minority controlled broadcasting company in the United States.

Thus, while the Distress Sale Policy is hardly a huge carve-out for minority ownership, it is important and worth maintaining, especially in the absence of more expansive alternatives.

Even when it suspended the Distress Sale Policy in 1986 to consider its constitutionality,<sup>41/</sup> the Commission acknowledged that the policy furthered a compelling governmental interest.<sup>42/</sup> In 1988, 1989 and 1990, Congress prevented the Commission from spending money to repeal or suspend the Distress Sale Policy.<sup>43/</sup>

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<sup>39/</sup> A summary of distress sales appears in 1992 Radio Rules, 7 FCC Rcd at 2826 Appx. 2 (1992) (subsequent history omitted) (between 1978 and 1992 there had been 38 stations transferred under the policy. Twenty-two of these transactions occurred in 1980.

<sup>40/</sup> See WOL, Inc., 79 FCC2d 647 (1980).

<sup>41/</sup> Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications (NOI), 1 FCC Rcd 1315 (1986) ("1986 Minority Ownership NOI") (suspending the Distress Sale Policy and the use of race as a factor in comparative hearings). This unexpected ruling so disturbed the civil rights community that MMTC was founded the next day to seek to preserve these policies. Ironically, just a year earlier the FCC had called for comment on a proposal, initially offered by NABOB, to "extend the availability of the distress sale option" by allowing distress sales (at no more than 50% of fair market value) before findings of fact and conclusions and law are filed with the ALJ. Distress Sale Policy for Broadcast Licensees (NOI), FCC 85-543 (1985) at 3 ¶3. The Commission never acted on this proposal.

<sup>42/</sup> Id. at 1317 ¶14 ("[w]e find program diversity [a] compelling governmental interest within the Commission's authority.")

<sup>43/</sup> See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329-31 and S. Rep. No. 100-182, p. 76 (finding that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences"); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, 102 Stat. 2216; Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 1020.

The following year, in Metro Broadcasting, the Supreme Court applied intermediate scrutiny and upheld the constitutionality of the Distress Sale Policy.<sup>44/</sup> The Commission's brief in Metro Broadcasting contended that the Distress Sale Policy would also satisfy strict scrutiny, but the Court did not reach that question. Subsequently, in 1995, the Court held in Adarand III that federal affirmative action programs should be reviewed under strict scrutiny, and it overruled that section of Metro Broadcasting that held that such programs should be reviewed under intermediate scrutiny.<sup>45/</sup> In 1997, responding to Adarand III, the Commission revised its auction rules in order to eliminate bidding credits for minority ownership.<sup>46/</sup> Importantly, however, the Commission did not find it necessary to revise the Distress Sale Policy.

When the Commission suspended the Distress Sale Policy in 1986, it asked "whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve this goal."<sup>47/</sup> Scholarly research conducted in subsequent years has overwhelmingly answered this question in the affirmative.<sup>48/</sup> Further, racial diversity

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44/ Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ("Metro Broadcasting").

45/ Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("Adarand III").

46/ See pp. 7-8 n. 29 *supra*.

47/ 1986 Minority Ownership NOI, 1 FCC Rcd at 1317 ¶14.

48/ These studies are collected in the Comments of Consumers Union *et al.* in MM Docket No. 01-235 (Cross-Ownership of Broadcast Station and Newspapers) (filed December 3, 2001), pp. 53-54 ns. 87-89, and in the Comments of EEO Supporters (MMTC *et al.*) in MM Docket No. 98-204 (Broadcast and Cable Equal Employment Opportunity Rules and Policies) (filed March 5, 1999), pp. 166-71. Justice Brennan's majority opinion in Metro Broadcasting cited several studies supporting its conclusion that "an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities." *Id.* at 580-52. More recently, a comprehensive study sponsored by the Commission pursuant to 47 U.S.C. §257 (1996) reached the same conclusion. See Christine Bachen, Allen Hammond, Laurie Mason and Stephanie Craft, "Diversity Of Programming In The Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity And News And Public Affairs Programming?" Santa Clara University School of Law (2000), which found that minority owned radio stations aired more racially diverse programming than did majority owned stations, were significantly more likely than majority owned stations to broadcast programming about women's issues and live coverage of government meetings, and were more likely to have a minority format for their music programming. The study also found that minority owned

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in broadcast ownership is assuredly a compelling governmental interest.<sup>49/</sup>

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<sup>48/</sup> [continued] television stations were significantly more likely than their majority owned counterparts to offer current events programming and to address issues relevant to senior citizens. Furthermore, the study concluded that radio and television stations with more minorities on their staffs broadcast more racially diverse programming than comparable stations with few minority employees. This finding sheds light on another reason minority ownership advance program diversity, since has long been established that minority owned stations hire far more minorities at all levels of employment than nonminority owned stations in the same market that broadcasting the same format. See Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," in Proceedings of the Tenth Annual Telecommunications Policy Research Conference 85 (1983).

An ancillary issue in assessing the constitutionality of federal affirmative action initiatives is whether the class of beneficiaries of the initiative should be limited to members of the racial groups that have been disadvantaged. This concern arose in the minority contracting case City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ("Croson"), which rejected a remedial program that aided members of minority groups, such as Alaskan Natives, whose members were barely present in Richmond and as to whom there was no evidence of past discrimination in Richmond contracting. Id. at 506. That issue does not arise with respect to the Distress Sale Policy, since it was not designed as a remedial policy. Although we believe that remediation can and should be a basis for the Distress Sale Policy, it was in fact designed to promote diversity. See 1978 Policy Statement, 68 FCC2d at 981 ("[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming"); see also Metro Broadcasting, 497 U.S. at 556 ("[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community, but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934...but also of the First Amendment"); see also Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (NPRM), 10 FCC Rcd 27887 ¶1 (1995) (purpose of FCC efforts to promote minority ownership "is to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity" (fn. omitted)). The principal beneficiaries of diversity programs are members of the listening and viewing audience -- all of whom, irrespective of race or geographic location, benefit from access to the views of minorities. See Waters Broadcasting Co., 91 FCC2d 1260, 1264-65 ¶9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) ("minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation"); 1978 Policy Statement, 68 FCC2d at 981 ("[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience.")

<sup>49/</sup> The constitutionality of the Distress Sale Policy is not at issue in this case. No one has contended that she would be harmed by the grant of the distress sale applications of Caledonia Communications Corporation ("Caledonia"). Nonetheless, the Commission should be reassured that the Distress Sale Policy's constitutionality flows easily from Grutter, because diversity in broadcast ownership is at least as compelling a governmental interest as diversity in education.

In Grutter, the Supreme Court held that in the context of law school admissions, a race-conscious admissions program is justified because "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is

[n. 49 continued on p. 14]

Further, the Policy has operated free of taint. The only reported case of abuse, a generation ago, resulted in a substantial forfeiture,<sup>50/</sup> and since then there have been no reports of abuse.

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<sup>49/</sup> [continued] to be realized.” Id., 123 S.Ct. at 2340-41. Since education is “pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society,” it follows that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.” Id. at 2340 (citation omitted). The Court cited with approval Justice Powell’s recognition, in Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1978), of “a constitutional dimension, grounded in the First Amendment, of educational autonomy” and his conclusion that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seeks to achieve a goal that is of paramount importance in the fulfillment of its mission.” Grutter, 123 S.Ct. at 2339 (citations omitted). Further, the Court in Grutter pointed to the importance of “diminishing the force of...stereotypes” as “both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.” Id., 123 S.Ct. at 2341.

These functions of educators are exactly what broadcasters do every day over the airwaves. Indeed, broadcasting today serves as powerful an educational function as our institutions of higher learning. Virtually all discussion heard on a broadcast station is educational, as evidenced by the Commission’s recent holding that the Howard Stern Show is a bonafide news interview program. Infinity Broadcasting Operations, Inc. (Declaratory Ruling), 18 FCC Rcd 18603 (Media Bureau, 2003); see also Multimedia Entertainment, 9 FCC Rcd 2811 (MMB 1994) (Jerry Springer Show is a bona fide news interview program). A minority owned broadcast station is at least as likely as a minority student in a university to help prepare young people to adapt to a multicultural society. See Metro Broadcasting, 497 U.S. at 556 (“[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community, but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934...but also of the First Amendment.”)

Consequently, Grutter’s holding that diversity in education is a compelling governmental interest easily leads to the conclusion that diversity in broadcast ownership is a compelling governmental interest. Indeed, Grutter’s central holding was itself imported from the Court’s recognition that diversity in another leading institution -- the military -- is a compelling governmental interest. The Court enthusiastically agreed that “a highly qualified, racially diverse officer corps...is essential to the military’s ability to fulfill its principal mission to provide national security” and concluded that “it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” Id. at 2340, citing Brief for Julius W. Becton, Jr. et al. as amici curiae, p. 27. Unquestionably, the electronic mass media, and its rarified ownership ranks, constitute one of the nation’s “other most selective institutions” in need of diversity, inasmuch as “it is upon [broadcast] ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with regard to editorial comment and the presentation of news.” TV-9, 495 F.2d at 938 (fn. omitted).

<sup>50/</sup> Silver Star Communications-Albany, Inc. (MO&O), 6 FCC Rcd 6905, 6906-6907 ¶¶17-22 (1991), in which the Commission assessed a \$20,000 forfeiture where licensee acquired AM-FM stations under the Distress Sale Policy intending to resell them to a nonminority. The Commission found this misconduct not to be disqualifying because the licensee was “influenced by the uncertainty as to whether it was permissible to ‘spin off’” unwanted stations acquired in a larger package through a distress sale, and because this was not a case “where a minority served as a ‘front’ for a nonminority.” Id. at 6907 ¶21.

The Distress Sale Policy is not charity. Instead, a distress sale confers on minorities the opportunity to repair some of the most troubled stations in the United States. Sometimes these turn out to be valuable properties, but usually, they're turnarounds. Distress sale properties certainly offer the minority entrepreneur an opportunity to learn the broadcasting business the hard way. Yet while minority broadcasters benefit from the Distress Sale Policy, by far the greater beneficiaries are the American people, of all races, who enjoy a greater opportunity to become exposed to the multiplicity of views of minorities.<sup>51/</sup>

### **III. The Commission Should Reverse The Bureau's Sub Silentio Nullification Of The Distress Sale Policy**

Perhaps the Bureau did not intend to nullify the Distress Sale Policy, but that is unquestionably the result of Huber.

The heart of the Distress Sale Policy is that the seller is a wrongdoer, he is removed from broadcasting, and a qualified applicant replaces him. Until this decision (with the exception of one case involving the statutory prohibition on federal benefits to major narcotics offenders) all of broadcasting's civil wrongs were amply deterred by designation for hearing and removal from broadcasting. In Huber, however, the Bureau denied distress sale relief because of the supposed need for even more deterrence of three civil wrongs -- misrepresentations, failure to respond to Commission correspondence, and engineering violations which, while serious, evidently were not life-threatening. The Bureau cited no evidence that hearing designations do not offer sufficient deterrence, or that the unavailability of distress sales would have any material additional deterrent effect. To say the least, Huber was unprecedented.

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<sup>51/</sup> See Grutter, 123 S.Ct. at 2334 (citing expert testimony that "indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students.")

The civil wrongs at issue in Huber are congruent with, or even more serious than any of the full range of civil wrongs that figure in all distress sale cases.<sup>52/</sup> Consequently, if Huber is affirmed, there will be no more distress sales. Designation for hearing is the predicate for a distress sale; yet if Huber is affirmed, all wrongdoing serious enough to justify a hearing will actually make the seller ineligible for a distress sale. It is as though the Federal Golf Commission, too embarrassed to admit that it wants to ban golf, declares “oh, you can still play golf. You just can’t use golf balls anymore.” In like manner, Huber has repealed the Distress Sale Policy through the backdoor by reducing the size of the class of potential distress sale cases to zero.

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<sup>52/</sup> We could find no distress sale case that involved issues materially less serious than those in Huber. Indeed, one of the issues, involving RF violations, is seldom deemed weighty enough to justify designation for hearing. See, e.g., A-O Broadcasting, Inc. (NAL), 17 FCC Rcd 24184, 24191 ¶23 (2002) (proposing forfeiture); A-O Broadcasting Corporation (Forfeiture Order), FCC 03-332 (released December 29, 2003) (imposing forfeiture). The issues in the instant case (misrepresentations, failure to respond to Commission correspondence, as well as the aforementioned RF violations) are typical, and often far less serious than the issues designated in the 14 distress sale cases for which the hearing issues are reported. See Northland Television, Inc. (MO&O), 72 FCC2d 51 (1979) (logging, fraudulent billing and misrepresentations); Lee Broadcasting Corp. (HDO), 66 FCC2d 544, 563 (1977) and MO&O, 76 FCC2d 462 (1980) (unfair competition, misrepresentations, filing false statements with the Commission, political broadcasting violations); Blair County Broadcasters (MO&O), 77 FCC2d 144 (1980) (fraudulent billing, misrepresentations); Grayson Enterprises, Inc. (MO&O), 77 FCC2d 156 (1980) (lack of candor/misrepresentation, unauthorized and willful change in main studio location, fraudulent billing, program log falsification and/or fabrication); Patrick Henry (Order), 69 FCC2d 1305, 1315-16 (1978) and MO&O, 79 FCC2d 393 (1980) (inadequacy of nonentertainment programming, failure to perform as promised in its renewal application, and intimidation of a challenging party); WOL, Inc. (MO&O), 79 FCC2d 647, 648 n. 4 (1980) (payola, plugola, licensee supervision and submission of false documents to the Commission); Tuscola Broadcasting Co. (MO&O), 47 RR2d 587, 588 (1980) (fraudulent billing, lack of supervision of the station, and violations of rules requiring the filing of stock option contracts and ownership reports); Rocket Radio, Inc. (HDO), 86 FCC2d 655, 656 (1981) and MO&O, 88 FCC2d 433 (1981) (submission of false affidavit in an attempt to discredit a competing applicant for new facilities, and (as a Mayor) using a building inspector and police officers to obstruct and investigate the competing applicant and its volunteers); Faith Center, Inc. (MO&O), 88 FCC2d 788, 789 (1981) (subsequent history omitted) (fraudulent over-the-air fund solicitation and failure to cooperate with a Commission investigation); Cullman Broadcasting Company, Inc. (MO&O), 55 RR2d 1652, 1653 (1984) (participating in filing of a strike application); Black Television Workshop of Los Angeles, Inc. (MO&O on reconsideration), 6 FCC Rcd 381 ¶2 (1991) (“BTW”), recon. denied, 6 FCC Rcd 4431 (1991) (abdication of control); Atkins Broadcasting (HDO), 8 FCC Rcd 675, 678-79 ¶25 and MO&O, 8 FCC Rcd 6321, 6322 ¶2 (1993) (unauthorized construction and nine separate misrepresentation issues); Chestnut Broadcasting Company (MO&O), 9 FCC Rcd 6141 (1994) (unauthorized transfer of control and misrepresentations concerning the unauthorized transfer of control); Desert Broadcasting Corp. (HDO and NAL), 11 FCC Rcd 14860, 14860-61 ¶¶2-3 (1996) and MO&O, Media Bureau (1997) (racketeering, fraud, sales of unregistered securities in connection with over 150 sham applications for construction permits).

#### **IV. The Distress Sale Policy Should Be Applied On A Case By Case Basis**

The Bureau was correct in recognizing that the Distress Sale Policy “is not to be rigidly applied.”<sup>53/</sup> Indeed, the case-by-case nature of the distress sale is a positive factor underscoring that the Distress Sale Policy is narrowly tailored to accomplish the goal of promoting racial diversity in broadcast ownership. In Grutter, the Supreme Court held that the University of Michigan appropriately used race as one factor in its case-by-case, individualized assessments of the qualifications of applicants to its law school.<sup>54/</sup> However, in Gratz, Grutter’s companion case, the Court held that the university’s practice of mechanistically assigning points to race in its assessment of the qualifications of candidates for admission to its undergraduate school was not narrowly tailored to achieve the University’s asserted compelling interest in diversity.<sup>55/</sup> Instead, a program “must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.”<sup>56/</sup> These holdings in Grutter and Gratz confirm that the Bureau was correct in holding that the Distress Sale Policy “is not to be rigidly applied.”<sup>57/</sup> The Distress Sale Policy cannot be “flexible in theory, but rigid in fact.”<sup>58/</sup>

It does not follow, however, that the constitutionality of the Distress Sale Policy would be somehow enhanced by arbitrarily singling out some hapless distress sale applicant and finding

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<sup>53/</sup> Huber, p. 3. See NTIA Petition, 69 FCC2d at 1595 (“our review of applications for distress sale relief necessarily involves the balancing of increased minority participation and reduced procedural burdens in hearing on the one hand, with the need to preserve substantial deterrents to licensee misconduct which are essential to the integrity of the licensing process.”)

<sup>54/</sup> Id. at 2343.

<sup>55/</sup> Gratz, 123 S.Ct. at 2430.

<sup>56/</sup> Grutter, 123 S.Ct. at 2343.

<sup>57/</sup> Huber, p. 3.

<sup>58/</sup> We are “sampling” Justice O’Connor’s famous assertion that strict scrutiny is not “strict in theory, but fatal in fact.” Adarand III, 515 U.S. at 237 (citation omitted).

some reason to deny its application. Such a decision would do nothing to “prove” that the Commission uses the Grutter model rather than the Gratz model. After all, the key in Grutter and Gratz is the process used by the state actor, not the results obtained. Following Grutter, the process the Commission should use in assessing distress sale applications is individualized, full file review of each application,<sup>59/</sup> to determine whether the proposed buyer’s qualifications would promote diversity, as contemplated by the Commission when it adopted the Policy.

When the Commission adopted the Distress Sale Policy, it provided that “[t]he parties involved in each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy.”<sup>60/</sup> However, in this and previous instances, no such showing by the parties was required -- an omission that may owe to the absence, until Grutter, of a constitutional requirement for such a showing. Fortunately, that error is easy to correct. In light of Grutter, the Commission should assess a distress sale purchaser’s ability to promote diversity. In this instance, is Caledonia a bonafide company? Is it committed to providing service to the public for a substantial length of time, or is it going to quickly sell the stations to someone else? Does it have a plan to serve the needs of the public, and to repair any damage done by Family’s inept stewardship? Is it committed to applying its sensitivity to the minority community to promote diversity in program service in some meaningful or unique way?

Caledonia has not been placed on notice that it needs to answer these questions. The Commission should take Caledonia’s responses into account in its review of the record.

#### **V. The Bureau’s Deterrence Analysis Is Deeply Flawed**

The Bureau’s decision to disallow distress sale relief was based on its theory that deterrence, in this instance, outweighed the benefits of minority ownership. This decision was flawed for five reasons:

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<sup>59/</sup> See Grutter, 123 S.Ct. at 2343 (approving of the University of Michigan Law School’s use of “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”)

<sup>60/</sup> 1978 Policy Statement, 68 FCC2d at 983.

First, the Bureau apparently considered specific deterrence -- specifically, whether denying distress sale relief would deter further wrongdoing by Family itself. That factor is irrelevant. See §IV(A) infra).

Second, the Bureau illogically assumed that fairly pedestrian forms of misconduct, of the type that typically arise in hearing cases, can and should be generally deterred by withholding the distress sale option (see §IV(B) infra).

Third, the Bureau failed to consider the needs of the radio listening public for the prompt institution of broadcast service in the public interest (see §IV(C) infra).

Fourth, the Bureau failed to consider the benefit to the Commission itself in securing the early termination of this litigation (see §IV(D) infra).

Fifth, when it compared deterrence to minority ownership, the Bureau failed to assess the weight of either factor, much less explain how it determined that one weighs more than the other (see §IV(E) infra).

**A. The Bureau Erroneously Considered Specific Deterrence**

The Bureau's deterrence analysis included both specific deterrence and general deterrence. Its focus on specific deterrence was unprecedented, never before having figured in a distress sale case. It was also irrational. A company that relinquishes its licenses in a distress sale never returns to broadcasting and thus does not need to be deterred anymore.<sup>61/</sup> In any event, the Commission could easily condition distress sale relief on a lengthy ban of a wrongdoer from the industry.<sup>62/</sup>

**B. The Bureau Should Almost Never Consider General Deterrence In A Distress Sale Case**

Soon after the Distress Sale Policy came into being, the Commission stated in rather opaque dictum that the nature of a licensee's misconduct could be a factor in whether to allow distress

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<sup>61/</sup> Our research failed to identify a case in which a distress sale seller returned to the industry.

<sup>62/</sup> See Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that the Fourteenth Amendment does not prevent a state from denying the right to vote to an ex-felon, even if she has fully paid her debt to society).

sale relief.<sup>63/</sup> However, in its 1984 decision in Faith Center, the Commission clarified this issue, holding that “the renewal applicant’s qualifications are not a relevant consideration in a distress sale situation.”<sup>64/</sup> The misconduct in Faith Center involved fraudulent over-the-air fund solicitation and failure to cooperate with a Commission investigation -- allegations at least as serious as the misconduct here, if not more so.<sup>65/</sup>

Since Faith Center, the issue of whether to reject a distress sale because of the nature of a licensee’s misconduct has only arisen once -- in Newsouth. The Commission had no choice in Newsouth but to deny distress sale relief, since Congress clearly expected judges (and, by implication, agencies) to deny federal benefits to those convicted of major narcotics offenses.<sup>66/</sup> Further, the misconduct of the licensee in Newsouth certainly was in a class by itself: large-scale drug money laundering punishable by up to 20 years in prison.<sup>67/</sup> Thus, the Newsouth decision distinguishes Faith Center.<sup>68/</sup> This case is the first occasion since Newsouth in which general

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<sup>63/</sup> NTIA Petition, 69 FCC2d at 1595 (“our review of applications for distress sale relief necessarily involves the balancing of increased minority participation and reduced procedural burdens in hearing on the one hand, with the need to preserve substantial deterrents to licensee misconduct which are essential to the integrity of the licensing process.”) This language was cited in Northland Television, Inc., 72 FCC2d at 54, but only to suggest that “the objectives of the distress sale policy not be undermined by whatever standard is ultimately adopted for evaluating prices” at which the stations are sold.

<sup>64/</sup> Faith Center, Inc., 99 FCC2d 1164, 1172 n. 16 (1984).

<sup>65/</sup> Faith Center, Inc., 88 FCC2d 788, 789 (1981) (subsequent history omitted).

<sup>66/</sup> See Anti-Drug Abuse Act of 1988, originally 21 U.S.C. §853a (1988) and presently codified at 21 U.S.C. §862 (1990), which provides that that “[a]ny individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances” shall, inter alia, “at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction[.]” 21 U.S.C. §862(a)(1)(A). A “Federal benefit” includes “the issuance of any...commercial license provided by an agency of the United States[.]” 21 U.S.C. §862(d)(1)(A). Federal agencies are expected to “implement and enforce the requirements of this section[.]” 21 U.S.C. §862(g)(1)(B). The statute authorizes, but does not require, agencies to revoke federal benefits where a court has exercised its discretion to deny them. See Garvey v. Ortiz, NTSB SE-14605 (1998) (FAA Administrator held to have statutory authority, in the interest of aviation safety, to revoke commercial pilot certificate of convicted drug trafficker).

<sup>67/</sup> Newsouth, 6 FCC Rcd at 5048 ¶2.

<sup>68/</sup> Faith Center’s relevant holding reads as follows:

[n. 68 continued on p. 21]

deterrence was found relevant in a distress sale situation.

The misconduct in this case was hardly trivial; otherwise, it would not have led to a hearing designation order. However, it is the routine grist of hearing lore.<sup>69/</sup> Avoiding mind-numbing hearings on misrepresentation, nonresponsiveness to FCC correspondence and engineering violations is a principal reason why we have the Distress Sale Policy. As Family correctly points out, “the distress sale policy is expressly tailored for wrongdoers. If a distress sale cannot be permitted because there is wrongdoing, the distress sale policy becomes completely meaningless.”<sup>70/</sup> As noted above, distress sale relief has always been awarded to resolve hearings involving issues similar to, or less serious than the acts at issue were.<sup>71/</sup> Family has sung Melody Music with perfect pitch.<sup>72/</sup>

In not one reported distress sale case has the Commission ever suggested that the types of misconduct figuring in this case can be generally deterred by withholding the distress sale option.

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<sup>68/</sup> [continued]

Even if the allegations are assumed to be true, they would not prevent us from approving the distress sale herein and do not require any action by us at this time, since the renewal applicant’s qualifications are not a relevant consideration in a distress sale situation.

Faith Center, 99 FCC2d at 1172 n. 16. In a footnote in Newsouth, the Commission suggested that this sentence was “intended merely to confirm that the Commission is not ‘prevent[ed]’ from approving a distress sale involving serious misconduct” because “any other interpretation would be inconsistent” with the dicta in the 1978 Policy Statement, 68 FCC2d at 983 and in NTIA Petition, 69 FCC2d at 1595, to the effect that “the distress sale policy is not a “rigid rule.”” Newsouth, 6 FCC Rcd at 5048 n. 2 (quoting 1978 Policy Statement, 68 FCC2d at 983). Thus, it appears that there could be some instance in which a licensee’s misconduct is so awful that deterring similar misconduct could outweigh the need to promote minority ownership. Still, until this case, the only type of misconduct justifying denial of distress sale relief was the drug money laundering that figured in Newsouth. Even the notorious “Tom Root” case, which involved a fraud upon the Commission that involved over 160 broadcast applications, was not so egregious as to preclude distress sale relief. Desert Broadcasting Corp., supra.

<sup>69/</sup> See p. 16 n. 52 supra.

<sup>70/</sup> Application for Review of Family Broadcasting, Inc. (“Family App. Rev.”), November 20, 2003, p. 4.

<sup>71/</sup> See p. 16 n. 52 supra.

<sup>72/</sup> Family App. Rev., p. 5, citing Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

Instead, experience has shown that being designated for hearing is deterrence enough: it is highly unlikely that any licensee would be more deterred from committing rule violations just because distress sale relief might be unavailable. Were that not the case, the Commission would have observed a sudden spike in undeterred wrongdoing from 1979-1981, when the majority of distress sales took place.<sup>73/</sup> No such spike occurred, however.

Furthermore, in not a single case has it ever been reported that a licensee interpreted the availability of the Distress Sale Policy as a signal that the Commission would be more tolerant of misconduct. That is unsurprising. Imagine how improbable it would be for someone to “reason” that “if I get caught misleading the Commission, and I get thrown into hearing, I can always escape with the loss of ‘only’ one quarter of my life’s work -- plus the loss of my career, my professional standing, and my opportunity to continue to grow my broadcast company. That would be so much better than going through hearing, either losing everything or winning everything, and continuing to profit from my broadcast operation throughout years of appeals.”

Still, we do not want to go so far as to say that general deterrence is never an appropriate factor in a distress sale case. There may be a very rare case in which the misconduct is so loathsome that even a featherweight of additional potential deterrence -- even deterrence of the lowest potential impact -- could still trump the need to promote minority ownership. Had it been designated for hearing, Columbus Broadcasting would have been such a case.<sup>74/</sup> The trouble with Huber is that Family’s serious but fairly commonplace types of misdeeds are being invoked

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<sup>73/</sup> These early distress sale cases generally involved misdeeds committed before the 1978 Policy Statement was issued. Hearing designation orders issued after 1980 generally involved misconduct occurring since 1978. After 1981, hearing designation orders became rare; thus, it might be surmised that the Distress Sale Policy actually disincentivized wrongdoing. However, the real reason for the infrequency of hearing designations after 1980 was the relaxed rule enforcement that began in the Fowler administration and continues to this day.

<sup>74/</sup> Today’s broadcasters may find it unseemly when a radio station broadcasts simulated sex in a church or records the killing of a pig. That was nothing compared to the systemic, aggressive anti-minority behavior of most broadcasters in the decades between 1920 and 1970. Among all of the horror stories of that era, one especially stands out: The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) (“Columbus Broadcasting”). That case involved the most revolting misconduct in the history of the FCC: the use of the airwaves to incite a race riot in which a university burned and two people were killed. Thus, even jaded civil rights veterans were shocked when the FCC denied FBI Director J. Edgar Hoover’s complaint, holding that the matter was a case of first impression and therefore issuing only an admonishment.

for the first time in FCC history as distress sale killers. Before deciding upon a Bad Acts Hit Parade, consisting of misdeeds so noxious that they even trump the need for minority ownership, the Commission might pause and consider some of the questions it would open up for debate: How many Bad Acts must be committed before minority ownership is brushed aside -- two? Four? Twenty? If misrepresentations, not answering letters, and engineering violations (per Huber) are on the Bad Acts Hit Parade, what about intentional employment discrimination?<sup>75/</sup> What about ownership fraud, such as real party in interest schemes? Serial indecency? Obscenity? Selling spots below cost to force a competitor out of business? Failing to serve the problems, needs and interests of the public? Violating Section 315? Committing perjury that would be an impeachable offense for an elected official? Outing a CIA “NOC”? Playing song after song that degrades women, extols violence or glorifies illegal drug use?<sup>76/</sup> Failing to advise the public of frauds, health hazards, or weather emergencies? Finally, if broadcasters that do these things deserve to be designated for hearing, wouldn’t the public be better off if the FCC replaced these broadcasters expeditiously through the Distress Sale Policy?<sup>77/</sup>

Ten years ago, the D.C. Circuit recognized that a thorough, public process, including notice and comment, was required in order to determine how large a forfeiture it intended to extract from regulatees for a long list of civil wrongs in cases that do not trigger license revocation.<sup>78/</sup> If a rulemaking was needed to assign penalties to broadcasting’s misdemeanors, shouldn’t at least that degree of care go into determining which of broadcasting’s felonies merit the death penalty?

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<sup>75/</sup> A recent Ford Foundation-sponsored study found that at the point of hire, 15% of broadcasters discriminate intentionally against women, 20% against African Americans and 24% against Hispanics. Alfred W. Blumrosen and Ruth G. Blumrosen, The Reality of Intentional Job Discrimination in Metropolitan America – 1999 (Rutgers University, 2002), pp. 204-205. If, as appears to be the case, about a fifth of stations intentionally discriminate, shouldn’t the Commission be designating about 3,000 renewals for hearing?

<sup>76/</sup> How much of today’s popular music would that be? 10%? 50%? 95%?

<sup>77/</sup> See p. 24 infra.

<sup>78/</sup> USTA v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (“USTA”). The proceeding held pursuant to USTA culminated in The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines (R&O), 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999).

Whatever else might go on the Bad Acts Hit Parade, the misdeeds enumerated in Huber don't belong there, either individually or collectively. If certain Bad Acts do indeed trump minority ownership, the Commission should tell the public what those certain Bad Acts are.

**C. The Bureau Did Not Weigh The Needs Of Virgin Islands Radio Listeners For The Prompt Institution Of Service In The Public Interest**

One of the strongest public interest benefits of the Distress Sale Policy is its usefulness in removing wrongdoers from broadcasting as rapidly as possible and allowing the public to receive service from a better licensee.<sup>79/</sup> The Bureau's decision was aimed at punishing Family, but instead it largely punishes the people of the Virgin Islands. Quite possibly, the people of the Virgin Islands have not been well served by Family. If Caledonia is well qualified and would contribute to diversity,<sup>80/</sup> a grant of its applications would serve the public in St. Croix far better than the continuation of hearing and appellate proceedings.

**D. The Bureau Did Not Weigh The Benefit To The Taxpayers Of Securing The End Of This Litigation**

When the Commission created the Distress Sale Policy, it held that "[t]he avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrent to wrongdoing."<sup>81/</sup> That holding is impossible to square with Huber, which does not even mention this factor and thus appears to have committed the error of changing course without supplying "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."<sup>82/</sup>

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<sup>79/</sup> See, e.g., BTW, 6 FCC Rcd at 382 ¶9 ("[n]ot only would the distress sale...further the Commission's goal of increasing minority participation in the broadcast medium, it would expedite the inauguration of a new, noncommercial, educational UHF television service in Los Angeles, one of the nation's most densely populated areas.")

<sup>80/</sup> See pp. 17-18 supra.

<sup>81/</sup> 1978 Policy Statement, 68 FCC2d at 983. Indeed, the avoidance of a hearing is so important that distress sale relief is unavailable where the hearing had already been held. See cases cited at p. 2 n. 6 supra.

<sup>82/</sup> Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 921 (1971).

In this instance, the gavel to gavel portion of the hearing would not consume very much time, since the basic facts have been stipulated. However, Family has available any number of defenses that could require the Commission to expend considerable time and expense on motions practice and on internal and external appellate review. There are far more productive and cost-effective ways for the Commission's staff to promote the public interest than writing briefs involving two small radio stations.

**E. The Bureau Failed To Weigh The Importance Of Minority Ownership**

The Bureau found that deterrence “outweigh[s] the benefit of continued minority ownership of these stations.”<sup>83/</sup> On the other hand, the Distress Sale Policy “provides broadcast licensees with an incentive to transfer their interests to minority-owned or controlled entities.”<sup>84/</sup> Although it placed deterrence on one side of scale and the minority ownership incentive on the other, the Bureau did not assign a weight to either factor. Had it done so, it would have realized that the need to aggressively promote minority ownership is even greater now than ever:

First, the demographics of the nation are changing rapidly -- 20% of the American people in 1978 were minorities; today, that figure is about 30% and growing rapidly.<sup>85/</sup>

Second, consolidation and other factors such as advertiser discrimination threaten minority owners' survival.<sup>86/</sup>

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<sup>83/</sup> Huber, p. 3. Parsing this phrase, a red flag stands out: the word “continued.” As it happens, both Family and Caledonia are minority owned. Thus, the Bureau appeared to be implying that the race of the incumbent licensee is a relevant factor in a distress sale case. That would be a mistake. Rule enforcement should be applied equally to minority and nonminority offenders.

<sup>84/</sup> 1982 Policy Statement, 92 FCC2d at 851.

<sup>85/</sup> See p. 10 n. 33.

<sup>86/</sup> See Kofi Ofori, “Radio Local Market Consolidation & Minority Ownership” (MMTC, March, 2002) (documenting adverse consequences of consolidation on minority radio broadcasters); Kofi Ofori, “When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority-Owned and Minority-Formatted Broadcast Stations (Civil Rights Forum on Communications Policy, 1999) (documenting advertiser discrimination against minority audiences). The difficulty in monetizing minority audiences was recently quantified in Philip M. Napoli, “Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences,” 46 Journal of Broadcasting and Electronic Media 169 (2002).

Third, due primarily to a series of self-inflicted wounds, the Commission has no other tools besides the Distress Sale Policy with which to advance minority ownership.<sup>87/</sup> It should not lightly fail to use its only remaining tool.

**VI. Rather Than Act Retroactively, The Commission Should Approve The Applications And Strengthen The Distress Sale Policy Prospectively**

Should there be any doubt, we encourage the Commission to err on the side of approval of the transaction. In Huber, the Bureau has articulated a new and unprecedented rule governing the availability of distress sale relief, and it applied that rule retroactively to Family and Caledonia, imposing on Family a a standard of punishment that did not exist when Family committed the underlying misconduct.<sup>88/</sup> That is unfair and it smacks of ex post facto law enforcement.<sup>89/</sup>

Only once before, in Newsouth, has the Commission elected not to approve a distress sale. Newsouth is sui generis because it was controlled by the Anti-Drug Abuse Act of 1988; thus, Newsouth offers no guidance on how the Commission will determine whether to allow distress sale relief. Before completing the due diligence and expensive appraisals required for distress sales, minority broadcasters deserve to know whether their time, effort and scarce financial resources would be wasted.

Consequently, instead of announcing a new policy in this adjudication, and then applying that policy retroactively to Family and Caledonia, the Commission should proceed as follows:

1. approve this transaction if a full-file review of Caledonia's bonafides reveals that approval would serve the public interest;<sup>90/</sup>

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<sup>87/</sup> See pp. 7-9 supra.

<sup>88/</sup> Huber, p. 3.

<sup>89/</sup> It is also probably unlawful. Although "statutes operate only prospectively, while judicial decisions operate retrospectively," U.S. v. Security Indus. Bank, 459 U.S. 70, 79 (1982), the rationale for the retrospectivity of judicial decisions "does not apply analogously to administrative agency decisions." Laborers' Int'l. Union v. Foster Wheeler Corp., 26 F.3d 375, 387 n. 8 (3d Cir.), cert denied, 513 U.S. 946 (1994).

<sup>90/</sup> In order to comply with Grutter, the Commission should require Caledonia to provide assurances about its bonafides. See pp. 17-18 supra.

2. include the subject of the proper applicability of the Distress Sale Policy in the Commission's forthcoming notice of proposed rulemaking on minority ownership,<sup>91/</sup> and

3. seek the guidance of the Advisory Committee on Diversity for Communications in the Digital Age on how the Distress Sale Policy can be made more expansive and effective.<sup>92/</sup>

## **VII. The Commission Should Hold Oral Argument**

Pursuant to 47 C.F.R. §1.277, MMTC respectfully requests that the Commission schedule this case for oral argument. MMTC requests 15 minutes to present its position.

Since 1980, oral argument has seldom been had.<sup>93/</sup> Recently, however, the Commission has begun taking laudable steps to foster public participation in its proceedings. On June 24, 2002, the Commission held a two-hour public hearing on broadcast EEO, in anticipation of its ruling in

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<sup>91/</sup> See Omnibus R&O, 18 FCC Rcd at 13638 ¶50 (promising to issue an NPRM to address minority and female ownership). Issues of minority ownership raised in the omnibus ownership proceeding should have been addressed there rather than shunted off in to a separate rulemaking. However, such a rulemaking would be a reasonable place to consider prospective improvements to the already-extant Distress Sale Policy, which was not at issue in the omnibus ownership proceeding. Certainly such a rulemaking is far preferable to this little-known Virgin Islands radio adjudication as a forum for consideration of the Distress Sale Policy. As the Commission has recognized, "[t]he rulemaking approach is accorded judicial preference when an agency develops new policies." Fresno Mobile Radio, Inc. (Order on Reconsideration), 1986 FCC LEXIS 3446 (May 13, 1986) at 10 ¶9 (citing National Petroleum Refiners Ass'n. v. FTC, 482 F.2d 672, 681-83 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974)).

<sup>92/</sup> See Charter, Advisory Committee on Diversity for Communications in the Digital Age, September 2, 2003, §B (mission of the Committee "is to make recommendations to the [Commission] regarding policies and practices that will further enhance the ability of minorities and women to participate in the telecommunications and related industries.") Recently, in an adjudicatory case, an *amicus* filed comments suggesting that a specific Commission policy tended to diminish opportunities for minorities and small businesses. (The undersigned represents the *amicus* in the matter.) The Commission responded by rejecting the commenter's contention in a sentence, adding that "on May 19, 2003, Chairman Powell announced the formation of the Advisory Committee on Diversity in Communications to assist the agency in formulating ways to create opportunities for new entrants in the communications sector, including broadcasting. Issues concerning barriers to entry will be appropriately considered in that forum." Infinity Broadcast Operations, FCC 03-302 (released December 8, 2003) at 4 n. 1. Instead of invoking the Diversity Committee's bare existence as one reason to deny relief, it would have been better if the Commission had sought the Diversity Committee's views on the underlying substantive matter. MMTC respectfully urges the Commission not to repeat this error in its review of this case.

<sup>93/</sup> When it conducted the proceedings leading to Deregulation of Radio, the Commission conducted two days of panel discussions that included the testimony of seventeen witnesses. The Commission "found the procedure helpful in shedding light on many areas of concern to us in a constructive manner." Id., 84 FCC2d at 974-75.

the EEO docket, MM Docket No. 98-204. Last spring, several hearings were held on media ownership, including three in which the Chairman participated. The Localism Task Force recently began a year-long series of hearings on the performance of local broadcast stations.

The issue presented in this case is whether the FCC should essentially repeal its only remaining policy designed to foster minority ownership. If any policy issue is more critical to the Commission's mission, we cannot think of it.

In this case, the Commission will essentially be fulfilling the role of a court of appeals, reviewing the decision of a subordinate authority. In such cases, oral argument commonly refines the issues and facilitates thoughtful review of nuanced cases. Bearing that in mind, the Commission should invite the Bureau, Family, Caledonia and MMTC to present oral argument on the merits and profound policy implications of the decision the Commission must render.

Respectfully submitted,

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January 8, 2003

**Certificate of Service**

I, David Honig, hereby certify that I have this 8th day of January, 2004 caused a copy of the foregoing “Comments of *Amicus Curiae* Minority Media and Telecommunications Council” to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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