MINORITY OWNERSHIP: AN UNDENIABLE FAILURE OF 
FCC MEDIA OWNERSHIP POLICY

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INTRODUCTION

The Federal Communications Commission’s (“FCC” or “Commission”) minority 
ownership policy has worked its way into the FCC’s larger media ownership and 
diversity debate. In December, 2003, Sherille Ismail, senior counsel in the FCC’s Office 
of Strategic Planning, stated that, “diversity includes the goal of increasing ownership of 
broadcast facilities by women and minorities through a variety of policies.”¹

First, this Article will analyze radio industry data regarding minority-formatted radio 
stations in the top fifty radio markets to determine the ratios between minority formatted stations 
and local minority populations. Furthermore, this Article will examine the structure of 
companies that were identified as operating a minority-formatted radio station within a top fifty 
market as a test of whether a group or independent ownership was more likely to result in the 
presentation of a minority based format.

Proponents of increasing the levels of minority ownership of media outlets rely on the 
belief that an increase in minority ownership will result in an increase in the amount of 
programming targeted at minorities. While the relationship between ownership and content 
diversity is complicated, some ownership factors have demonstrated that the race of owners has 
an effect on content production.² In terms of minority ownership, Laurie Mason, Christine M. 
Bachen and Stephanie L. Craft determined that minority owners are more likely to offer

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¹ Conference Report on Media Diversity and Localism: Meaning, Metrics, and the Public Interest, held by 
The Donald McGannon Communication Research Center (Dec. 15-16, 2003) available at 

² See Martin Gilens & Craig Hertzman, Corporate Ownership and News Bias: Newspaper Coverage of the 
1996 Telecommunications Act. 62 J. Pol. 369, 369-86 (2000). Other factors that have demonstrated effects on 
content are organizational structure and corporate interest.
programming formatted for minorities and minority-owned stations were more likely to tailor their news content towards minority concerns and audiences.³

While providing minorities the opportunity to own additional media outlets would appear to be a straightforward policy approach to increase content diversity, historically, the Commission used four policies to increase the amount of minority targeted media content. The first policy was ascertainment, which required broadcast stations to assess the needs of the local community.⁴ This process was accomplished by a series of meetings between media outlets and members of the local community to discuss issues of public concern. This dialogue served as a proxy for citizen access to the media and kept media organizations connected to their local communities. As part of the license renewal process, stations were required to demonstrate coverage of the issues raised in ascertainment proceedings.⁵ In terms of minority content, ascertainment was assumed to provide local broadcasters a method to reach into minority communities and provide coverage directed towards minority audiences.⁶

Alongside the ascertainment process, the FCC relied upon the Fairness Doctrine to increase minority-targeted content.⁷ The FCC believed the Fairness Doctrine’s requirement for balanced coverage of issues concerning the public would promote the coverage of minority issues, and the Doctrine’s requirements for a multisided discussion of public issues would provide an outlet for minority voices.⁸

The agency also assessed the effectiveness of these two policies by promoting the coverage of minority issues, and concluded that minorities were being underserved by broadcast outlets.⁹ The FCC’s solution was to increase the number of minorities working within the media.¹⁰ Subsequently, the FCC adopted the standard for broadcasters, which barred discrimination on the basis of race.¹¹

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⁵ Id. at 57.

⁶ Id. at 62.

⁷ Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257 (1949).


¹⁰ 1978 Policy Statement, supra note 8, at 979.

¹¹ Id.
While the Equal Employment Opportunity ("EEO") requirements increased the number of minorities employed by media companies and made them more visible, the hiring policies had a limited effect on the diversity of media content reaching audiences. One important reason for this result was that, despite the increase in the numbers of minorities employed by media outlets, few minorities held upper level positions where they were able to influence the programming content selection process.

In 1978, with the realization that EEO policies failed to enhance viewpoint diversity, the FCC adopted policies designed to increase direct minority ownership of broadcast outlets. The FCC reasoned that minority owners of local stations are best positioned to serve local minority audiences. To increase the number of minority owners, the FCC adopted a policy that made minority status a “qualitative enhancement” of a license applicant’s qualifications for a broadcast facility. The FCC implemented tax incentives to assist minorities with purchasing power. The FCC also permitted, in specific circumstances, the transfer of licenses at “distressed sales” prices to minorities.

The minority ownership enhancement policies were challenged, and were initially upheld in 1990 by the United States Supreme Court in Metro Broadcasting Inc. v. FCC. The dispute in Metro involved a comparative bidding proceeding for the rights to construct and operate a new UHF television station in Orlando, Florida. The FCC awarded the license and construction permit to a competitor, Rainbow Broadcasting. The agency gave a substantial enhancement to Rainbow because its ownership was 90% Hispanic, while Metro had only one minority partner.

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12 The FCC determined that minority issues were continuing to be ignored by local broadcasters. See Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report, (1978) [hereinafter Minority Ownership Report].


14 Id.

15 1978 Policy Statement, supra note 8, at 981.

16 Minority Ownership Report, supra note 12.

17 1978 Policy Statement, supra note 8, at 982-83.

18 Id. at 983.

19 Id. at 982-85. Distressed properties were stations failing economically or facing a license revocation proceeding. The distress sale policy fast tracked the license transfer between parties.

20 Anastos, supra note 13, at 8. One goal of the distress sale policy was to assist minority owners with financing. By reducing the value of the station sold under the distress sale policy to seventy-five percent of its actual market value, the Commission created an equity base for investors that provided security when making loans.


22 Id. at 558.

23 Id. at 559.
with a 19.8% stake. Due to this disparity, the FCC gave Rainbow a “substantial enhancement” that comparatively outweighed Metro’s “local residence and civic participation advantage.”

Prior to the Metro decision, Shurberg Broadcasting also challenged the FCC’s distress sale policy after filing a construction permit to build a station in Hartford, Connecticut. At the time, the permit was mutually exclusive to a station already on the air, which the owners, Faith Center, were trying to sell under the distress sale policy. The FCC approved the transfer of the station under the distress sale policy in 1980, but the applicant had financing problems that caused the abandonment of the transfer. By June of 1984, the FCC approved a second transfer of the station’s license under the distress sale policy to minority applicant, Astroline Communications. Shurberg petitioned the FCC to hold a comparative hearing to examine the mutually exclusive applications, claiming that the distress sale policy violated its Equal Protection rights. The FCC refused to hold the hearing, awarded the license to Astroline, and rejected the Shurberg challenge as “without merit” by December, 1984.

Both Metro and Shurberg challenged the FCC’s decision in federal court on the grounds that the policies violated the Equal Protection Clause; however, the FCC’s Metro decision was upheld, while the Shurberg decision was overturned. In Shurberg, the majority held that the distress sale policy was not “narrowly tailored to remedy past discrimination or to promote programming diversity.” The cases were eventually consolidated when the Supreme Court granted a writ of certiorari.

In the 5-4 decision, the majority held that both FCC minority enhancement policies could withstand intermediate scrutiny of the Fourteenth Amendment’s Equal Protection Clause. In applying intermediate scrutiny review, the Court held that the minority ownership policies at

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24 Id.
25 Id.
26 Id. at 562-63.
27 Id.
28 Id.
29 Id. at 562 (citing Faith Center Inc., 99 F.C.C. 2d 1164, 1171 (1984)).
30 Id. at 563.
32 Metro, 497 U.S. at 563.
33 Id.
34 See Metro, 497 U.S. 547.
35 Id. at 566.
issue in *Metro* served the important governmental objective of providing the public with diverse programming reflecting all races and ethnicities.\textsuperscript{36}

On a substantially related point, the Court found that the minority ownership policies were closely related to the long-standing policy goal shared by both Congress and the FCC in the advancement of minority ownership and hiring practices to achieve greater broadcast content diversity.\textsuperscript{37} Justice Brennan, writing for the majority, described diverse views and information on the airwaves as a “robust exchange” of ideas that minorities could bring through these policies which would result in a positive influence of news making and promote diversity in the hiring practices of existing media outlets.\textsuperscript{38} The Court also stated a belief that the previous policies, including ascertainment, had failed to provide a necessary level of minority content to listeners.\textsuperscript{39}

Justice Brennan also stated that it was of “overriding significance” that the enhancement and distress sale policies had been specifically mandated and approved by Congress.\textsuperscript{40} In light of these factors, the Court ruled that the substantial government interest in promoting diversity outweighed any Equal Protection violations, adding that the petitioners were free to bid on any other stations that became available.\textsuperscript{41}

In 1995, the *Metro* decision, which protected the licensing enhancement program, was largely overturned by a non-broadcast case, *Adarand Constructors Inc. v. Pena*.\textsuperscript{42} In *Adarand*, the four dissenters in the *Metro* decision and newly appointed Justice Clarence Thomas struck down a federal program granting preferences to minorities bidding on public works projects.\textsuperscript{43} The *Adarand* majority held that the lower court should have applied strict scrutiny review to the policies at issue in *Metro*.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{36} *Id.* at 567-68.
  \item \textsuperscript{37} *Id.* at 568-71.
  \item \textsuperscript{38} *Id.* at 567-70.
  \item \textsuperscript{39} *Id.* at 586-87.
  \item \textsuperscript{40} *Id.* at 563.
  \item \textsuperscript{41} *Id.* at 596.
  \item \textsuperscript{42} See generally *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (applying intermediate standard of review in a nonbroadcast challenging a federal program designed to provide highway contracts to disadvantaged businesses).
  \item \textsuperscript{43} *Id.*
  \item \textsuperscript{44} The opinion states:
  We hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further
Since the *Metro* decision, the FCC has done little in terms of minority ownership policies.\textsuperscript{45} The distress sale policy was discontinued, first by refusing to extend the policy to women, and then later refusing to extend the policy to spectrum auctions in 1990.\textsuperscript{46} The FCC prefers to deal with media ownership and content diversity through the ownership based Outlet Diversity Policy. Beginning in 1992, the FCC began to relax its ownership limits, allowing for an increase in the number of commonly owned properties. Ownership limits were relaxed by the FCC again in 1994 and by Congress following the passage of the 1996 Telecommunications Act, which eliminated the nationwide limits on radio station ownership.\textsuperscript{47}

In December of 2007, the FCC adopted a new policy proposal dealing with the ownership of broadcast facilities by minorities and women.\textsuperscript{48} The proposal adopted financial standards created by the Small Business Administration (“SBA”), based on gross sales revenue for a radio or television company.\textsuperscript{49} The new policy was implemented as part of a larger FCC effort to increase the number of small independent owners of media properties.\textsuperscript{50} Relying on the central premise of the FCC’s long standing Outlet Diversity Policy,\textsuperscript{51} the FCC believed that an increase in the number of “small media owners”\textsuperscript{52} would result in an increase in diversity of programming content, including targeting minority audiences.\textsuperscript{53} Because the FCC was no longer allowed to favor minority applicants directly,\textsuperscript{54} the agency relied on the SBA to create a class of applicants compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.

\textit{Id.} at 226-27.

\textsuperscript{45} In 1995, the FCC did update the biannual station ownership reports to include a section inquiring about minorities who are involved in the ownership of a station. Information gathered from these reports is discussed in the next section.

\textsuperscript{46} While awaiting a decision from the Supreme Court in the *Shurberg* and *Metro* cases, the Commission closed down a rulemaking proceeding that could have expanded the Distress Sale policy to new categories of participants, including women. *Notice of Inquiry [into] Distress Sale Policy of Broadcast Licensees*, 5 FCC Rcd. 397 (1990).

\textsuperscript{47} The rush to acquire stations following the passage of the 1996 Telecommunication Act also resulted in a sell off of minority owned broadcast stations. \textit{See} Kofi Asiedu Ofori & Mark Lloyd, \textit{The Value of the Tax Certificate}, 51 FED. COM. L.J. 693 (1998).


\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}


\textsuperscript{52} “Small media owners” consist of owners who operate single or a small group of stations.

\textsuperscript{53} 2007 Order, supra note 48, at 5.

called “eligible entities.”55 The “eligible entities” were required to meet financial standards created by the SBA based on gross sales revenue for a radio or television company.56

The policy proposed in 2007 represented a significant change from the earlier minority ownership initiatives. In fact, it was not only a minority ownership policy, but a broader and more comprehensive diversity policy.57 In crafting the new policy, the FCC relied on the long standing Outlet Diversity Policy and the agency’s continuing belief that more media owners assures more content diversity.58 By diversifying ownership, the FCC believes a wider array of programming services will become available.59 The policy relies on the creation of new, independently owned, media outlets; an organizational structure the FCC believes is more likely to have ties to a local community and the needs of the local audience.60

Despite the FCC’s stated goal of diversity enhancement, the agency argued that the type of minority enhancements at issue in Metro must now be subject to strict scrutiny.61 Therefore, the fastest way for a new policy to be implemented and bypass any constitutional barriers is to apply the policy as “race neutral.”62 Rather than providing ownership enhancements to minorities directly, the FCC argued that minorities and women could qualify under its new policy for startup media companies.63

55 The eligible entity must hold:

(1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.


56 Id.

57 Id. at 4.

58 2002 Review, supra note 51, at 18517.

59 Id.

60 2007 Order, supra note 48, at 5.

61 See id. at 5-6.

62 The FCC believes that by implementing the new policy on a race-neutral basis, and avoiding constitutional scrutiny on equal protection grounds, the policy can be implemented, and have demonstrable results much quicker. Id. at 6.

63 Id. at 17. The Commission is seeking comment on whether a special category of “eligible entity” should be created to assist minorities and women with the acquisition of media outlets, but for now the diversity policy will remain race and gender neutral.
Relying on existing financial standards created by the SBA for radio and television companies, the FCC replaced minority qualifiers with the “eligible entity” ownership category. To become an eligible entity, an applicant must meet the SBA standards as defined by total annual sales of an organization or its parent company. For radio, the qualifying limit was $6.5 million and for television the limit was $13 million. In addition, an eligible entity must hold:

1. 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or
2. 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or
3. more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.

This definition is also an outgrowth of the previous FCC definition of a station (or stations) with minority ownership. Currently, the FCC defines minority ownership of a broadcast outlet as “one or more minorities which, in the aggregate, have greater than 50% voting interest in the broadcast licensee entity.”

The eligible entity designation was first challenged and rejected by the United States Third Circuit Court of Appeals, which remanded the proceedings to the FCC. In July 2011, the Circuit remanded the FCC’s decision for a second time. While in the middle of the 2010 review process, the Circuit again cited procedural and evidential problems with the FCC’s actions:

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64 2002 Biennial Review Order, 18 FCC Rcd. at 13810-12, (2002). The “eligible entity” term was originally defined by the Commission in a 2002 order that provided an exception to the prohibition on the transfer of grandfathered station combinations that violated the local ownership rules. Transfers of these station combinations were allowed if the transfer was to an entity that would qualify as a small business under the SBA standards for media companies.

65 Id. at 13811.

66 Id.

67 2007 Order, supra note 48, at 12.


69 Id.

70 The FCC’s 2003 media ownership decision was overturned in the first of two judicial reviews, conducted by the Third Circuit Court of Appeals. See Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

71 See Prometheus Radio Project v. FCC, 652 F.3d 431, 437-8 (3d Cir. 2011) (the second time the Circuit remanded the decisions); see also Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (the first time the Circuit remanded the decisions).
The Commission failed to meet the notice and comment requirements of the Administrative Procedure Act (the “APA”). We also remand those provisions of the Diversity Order that rely on the revenue-based "eligible entity" definition, and the FCC’s decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business ("SDB")), so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.72

With respect to the procedural aspects of the policy, the FCC’s irregular actions taken on the day of the vote were matched with questions about the agency’s second failure to make the changes public prior to a vote.73 During oral argument at the 2011 Prometheus Radio Project v. FCC appeal, the FCC argued that two questions located in paragraph thirty-two of the Further Notice of Proposed Rulemaking (FNPR) counted as sufficient public notice of the changes.74 The majority was notably skeptical of the agency’s argument, and suggested that the FCC’s failure to provide adequate notice about how the new policy would work, both individually and in conjunction with other media ownership rules, was a “significant omission[].”75

Furthermore, in terms of evidence and rationale, the majority was unconvinced by the FCC’s actions regarding diversity and found that the agency’s eligible entity designation was arbitrary and capricious because it “lacks a sufficient analytical connection to the primary issue that the Diversity Order intended to address.”76 In both the 2004 Prometheus decision (“Prometheus I”) and the 2011 Prometheus decision (“Prometheus II”), the common theme was based on an entire absence of data or evidence from the record to support the FCC’s decisions.77 In light of this common theme, the majority in Prometheus II was extremely critical of the FCC’s failure in 2007 to meet the requirements of the remand regarding the ownership of stations by women and minorities that was issued in Prometheus I.78 Suggesting that the agency had “in large part punted” on the issue,79 the court’s 2011 ruling imposed a mandate that the remand had to be addressed before the completion of the 2010 Quadrennial Review:

72 The Third Circuit overturned the 2007 eligible entity policy in the second judicial review of the FCC’s media ownership policy. Prometheus, 652 F.3d at 437-8 (the second time the Circuit remanded the decisions).
73 Id. at 451-53.
74 Id. at 446.
75 Id. at 450.
76 Id. at 471.
77 See generally Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) (Prometheus II); Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (Prometheus I).
78 Prometheus, 652 F.3d at 467-68 (Prometheus II).
79 “Despite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt
[T]he eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The Commission has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.80

The ruling also signaled that the court’s patience with the FCC over these issues was strained.81 Nowhere was this more palpable than in footnote 42, in which the majority scolded the agency for failing to meet its obligations to develop evidence, and scoffed at the agency’s justification that the task was difficult:

Stating that the task is difficult in light of Adarand does not constitute considering proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary Adarand studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor. We are encouraged that the FCC has taken steps in this direction and we anticipate that it will act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.82

Although overturned and remanded for lack of supporting evidence, the 2007 initiative by the FCC was, at least in part, a response to valid citizen concerns about minority access and minority ownership raised during the agency’s 2006 quadrennial media ownership proceeding.83 However, “the overall level of minority and female ownership in the broadcast industry remains dismal” across the United States.84 The data collected by the FCC in 2003 painted a bleak

positive, the Commission has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the Commission relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.”

Prometheus, 652 F.3d at 471-72 (Prometheus II).

80 Id. at 471.
81 See id. at 471.
82 Id. at 471 n.42.
83 See id. at 472.
84 See id. at 470.
picture of minority ownership.\textsuperscript{85} Minority ownership of radio stations was claimed by only 391 of the 13,696 (2.85\%) radio stations on the air.\textsuperscript{86} Of the 1,749 commercial and educational television stations, only sixteen claimed to be owned by minorities (0.91\%).\textsuperscript{87} The FCC compiled similar data from ownership reports filed in 2004 and 2005.\textsuperscript{88} A comparable report filed by the FCC in 2005 revealed that of the 12,844 stations that filed FCC form 323 or 323-E,\textsuperscript{89} only 460 broadcast stations (3.6\%) met the Commission’s defined criteria for minority ownership.\textsuperscript{90}

Researchers using the FCC’s ownership data have suggested that the FCC’s data on minority and female ownership “is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”\textsuperscript{91} Arie Beresteau and Paul B. Ellickson, in a study included in the FCC’s 2006 Media Ownership Rulemaking Inquiry, explored the rates of minority and female ownership of the three traditional media outlets broadcast radio, television, and newspapers.\textsuperscript{92} Using ownership data provided by both the FCC and the Census Bureau, the authors found that minorities and females are both “clearly underrepresented,” in comparison to their populations, but at nearly the same rates they are underrepresented in “almost all industries of the economy.”\textsuperscript{93} Between 2002 and 2005, minorities, as a whole, never reached four percent combined ownership of broadcast television and radio stations.\textsuperscript{94} Additionally, the Beresteau and Ellickson study included data on the ownership of radio and television stations by African-Americans for the years 1991, 1996, 2001, and 2006, which demonstrates that ownership of media outlets by African-Americans represents a small percentage of the total number of broadcast stations on the air.\textsuperscript{95}

Using radio industry and ratings data, Todd Chambers, explored the ownership and programming patterns of Spanish language radio stations in the fifty metropolitan areas with the


\textsuperscript{86} Id. at 22 tbl. 11.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} FCC Form 323 Ownership Report for Commercial Broadcast Stations is an ownership report filed by stations every two years. FCC Form 323-E is filed by educational and noncommercial stations. Form 323-E does not collect information on Minority ownership.


\textsuperscript{91} Beresteau et al., supra note 85 at 2-3.

\textsuperscript{92} See id. at 2.

\textsuperscript{93} Id.

\textsuperscript{94} Id. at 22 tbl. 11.

\textsuperscript{95} Id. at 21 tbl. 10.
highest populations of Hispanics.\footnote{\citetoddchambers}{\citetoddchambers} Using the industry-defined formula, which identifies the unique Spanish formats in a single market, Chambers concluded that just over twenty percent (314 of 1,545) of the stations in these markets carried a Spanish language format.\footnote{id}{\ci{id}}

The data also revealed that larger radio companies controlled the stations within these markets.\footnote{see id}{\ci{see id}} Clear Channel Communications and Infinity controlled almost a third of all the stations in those markets.\footnote{id}{\ci{id}} According to Chambers, HBC, which provides a Spanish language format to fifty of sixty-one total stations, and Entravision, which provides a Spanish language format to forty-one of fifty-five total stations were the radio ownership groups that provided the most service to Hispanic audiences.\footnote{id}{\ci{id}} It is clear from the results of Chambers’ study that large radio groups have not diversified their outlets into stations carrying primarily minority-targeted content. However, mid-size companies, owned and operated by minorities, are the primary media organizations that provide a large quantity of minority content to audiences.

The evidence suggests that outlets owned by minorities provide more minority-based content. Furthermore, this evidence suggests that mid-size companies are providing the most minority-targeted programming. To address this, the FCC adopted a policy that is “race-neutral” and focuses on the creation of small media organizations. Given these contradictions, is the new policy arbitrary and capricious?

**Methodology**

To generate ratings, broadcast radio stations often rely on niche programming. Niche radio formats are designed to attract specific demographic groups. Since radio ratings are much lower on a station-by-station basis than broadcast television, radio stations which attract a marketable demographic can remain economically viable.\footnote{davidtankel}{\citethemanagement}{\ci{davidtankel}}
This paper uses an approach suggested by the FCC’s Program Diversity measurement to examine the content of the commercial radio stations in the top fifty radio markets by format.\textsuperscript{102} Program diversity makes assumptions about actual content of broadcasts based on the “type” of programming.\textsuperscript{103} The FCC measures program diversity on a program-by-program basis by assigning a station’s programs to various categories.\textsuperscript{104} Program diversity resulted in a measurement of the number of program formats, rather than a direct analysis of the content. The FCC used this method to measure television content as early as the 1960s.\textsuperscript{105}

While a straight count of radio stations by format leaves some questions unanswered about the actual content a station carries,\textsuperscript{106} the FCC cited,\textsuperscript{107} and even funded, studies using station format as a proxy measurement for content diversity.\textsuperscript{108} Although format might be considered a crude measure of a station’s actual content in terms of radio, where a single “format” will dominate a station’s programming, the program diversity measurement does provide an opportunity to examine the content of a large number of stations.

Katz Media maintains an online database called the Radio Research Center.\textsuperscript{109} Data on radio markets is organized by Metro Survey Area (“MSA”) and is updated regularly.\textsuperscript{110} Each of the top fifty radio markets MSAs were broken down and coded for the total number of commercial stations, number of Hispanic formats,\textsuperscript{111} number of Black formats,\textsuperscript{112} and the

\begin{footnotes}

\textsuperscript{103} 2002 Review, supra note 51, at 18518.

\textsuperscript{104} Id.

\textsuperscript{105} Id.


\textsuperscript{108} Id.


\textsuperscript{110} Id. Katz defines an MSA as “[t]he primary reporting area for local radio. Metro Survey Area definitions generally correspond to the federal government’s Metropolitan Areas, subject to exceptions dictated by historical industry usage and other marketing considerations as determined by Arbitron.”

\textsuperscript{111} Id. Hispanic music formats included: “Hispanic”, “Ranchera”, “Nortena”, “Bando”, “Tropical”, “Tejano.” Hispanic informational formats included Spanish language stations with a News-Talk, Sports, or All News Format.

\textsuperscript{112} Id. The Black Format is a “specific” format as defined by Katz. This category was expanded to include the format “urban talk” as the demographic information and description of the formats was nearly identical.
\end{footnotes}
number of “Other” minority formats.\(^\text{113}\) Audience data on a market’s Hispanics and African-American populations were also collected from the Katz database.\(^\text{114}\) This process provides the sample for addressing research question one (“RQ1”).\(^\text{115}\)

**RQ1:** How does the ratio of minority formatted stations in a market compare to the percentage of the local population that are minorities?

For this analysis, the number of minority stations was broken down into three groups: Hispanic formats, Black formats and “Other” minority formats. The Katz Media database provided data on Hispanic and African-American populations in each market as a percentage of the total population,\(^\text{116}\) and these ratios were compared to the number of stations in a market identified as providing a programming format designated for either minority group.

Following the primary analysis, data was collected on the organizational structure of each company identified as operating a Hispanic formatted radio station within the top fifty markets.\(^\text{117}\) The number and format of other commonly owned stations was compiled as a test of the ownership structures providing minority programming.

**RQ2:** What are the organizational structures of companies in the top fifty markets that provide minority programming formats?

The FCC’s new initiative, based on the SBA’s guidelines, was designed to encourage the creation of smaller media companies.\(^\text{118}\) Both the smallest and largest radio companies carry minority-programming formats.\(^\text{119}\) A policy promoting smaller startup stations may be an

\(^{113}\) *Id.* “Other” is a format designation in the Katz database that represents minority formats that do not meet the criteria for inclusion in one of the other categories. The database provides very little information on these formats.

\(^{114}\) *Id.*

\(^{115}\) *Id.*


\(^{117}\) *Id.* The island of Puerto Rico is MSA 15. The population data for the market was incomplete, but every station in the market is listed as running a Hispanic format. As a result, the available data for the market is reported, but it is excluded from the analysis. The Middlesex, NJ, MSA 41, is listed separately, but the market imports many stations from New York City due to geographic proximity. The San Diego market imports the signal of many stations from across the Mexican border and these cross-border stations were also eliminated from the sample.


\(^{119}\) *Id.*
ineffective way to promote viewpoint diversity if large consolidated media companies are already providing a variety of programming that targets minorities. Examining whether or not a station has a minority person or persons in control of 50% or more of the voting tells us little about what level of service or what type of content is being provided to the public. Therefore, RQ2 will examine how the size of a company relates to its format selection.

RESULTS

Based upon the Katz Media database, a total of 1,568 commercial radio stations operate in the top fifty markets. Of those stations in the top fifty markets, thirty-six stations, operating in Puerto Rico, were eliminated from the final sample. The final sample consisted of 1,532 stations. Of those stations, 225 carry a defined Hispanic format, nineteen carry a defined Black format, and twenty-four stations carry another ethnic or minority format. The market-by-market results are summarized below.

Table 1: Results

<table>
<thead>
<tr>
<th>Market</th>
<th>MSA</th>
<th>Stations</th>
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121 Id.
122 Id.
123 Id. Twenty Hispanic markets with at least as many Hispanic-formatted stations, by percentage, as the local Hispanic population, have been indicated in the table by a “y.” As none of the top fifty markets contain Black-formatted stations at a rate which meets or exceeds the local Black population, no Black stations are indicated in such a manner.
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Hispanic formatted stations operate in forty-two of the top fifty markets. In twenty markets, the ratio of Hispanic stations to the total number of commercial radio stations is equal

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124 *Id.*
to or exceeds the percentage of the local Hispanic population. Los Angeles has the highest number of Hispanic stations, followed by Dallas, Miami and Phoenix.

“Black” formatted stations operate in fifteen markets. Four of the top fifty markets have two operating Black-targeted stations. Conversely to the Hispanic market, there is an absence of stations in the top fifty markets with a ratio of Black-formatted stations equal or exceeding the percentage of the local population that is African-American.

There are sixty-eight different owners operating at least one Hispanic station in the top fifty markets. The organizational structures that operate Hispanic stations range from a single independent station owners to the largest radio company in the United States, Clear Channel Communications. Fifty-three of the sixty-eight companies operate only minority-formatted stations. The organizations that operate only minority formatted stations range from one to seventy-three stations. From the fifty-three station owners that operate only minority formatted radio stations, forty-seven of the owners operate six or fewer stations. Of the strictly minority stations, twenty-seven of the owners operate only a single station.

In the top fifty markets there are an additional fifteen station owners who operate a Hispanic formatted radio station. These markets range in size from three to 1,220 stations; ownership groups operate a total of ninety-one minority formatted stations. Out of seven of

125 Id.
126 Id. Puerto Rico has the highest number of Hispanic stations but, as stated, was not included in the final sample.
127 Id.; see also footnote 93, supra, for explanation on the Black market breakdown.
128 Id.
129 Id. Based on analysis from the Katz Media Database, the study suffers from a limitation that undercounts stations targeting African American audiences with an all music format. The data provided is for stations targeting African Americans with an informational format.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
these station groups, each operate fifteen stations or less. Three groups are operating a vast majority of the minority stations accounted for by these seven station groups.

**DISCUSSION**

The results, based upon the Katz Media database, demonstrate a handful of challenges for the FCC to consider as it moves forward. First, many of the media companies providing minority programming are small. These smaller companies consist of a single or just a handful of stations. This is not always the case; four of the largest radio companies in the United States, including the largest, Clear Channel Communications, provide minority formats in some markets. Many of the midsize companies providing minority formats are focused largely or entirely upon minority programming.

Second, Hispanic stations match the local audiences at a rate closer than the number of stations targeted at African-Americans. This study suffers from a limitation in design because it undercounts stations with music formats that are targeted at African-Americans. The results demonstrate that African-American audiences are being seriously shortchanged in comparison to their local populations. Another underpinning of the limitations of the study is that even if the music-formatted stations that target African-American demographics were counted, music based formats frequently lack the news and public affairs programming that is essential to meeting the FCC’s goal of viewpoint diversity.

Implementation of a policy that directly addresses this shortcoming will not be an easy task for the FCC. Relying on ownership and market conditions to create viewpoint diversity is a potentially suspect policy decision. The FCC’s unwillingness to test the theory of the relationship of ownership to viewpoint diversity remains apparent in the agency’s 2007 Order. Stations with an “informational format” are the most likely to contribute to the diversity of viewpoints. It is important to recognize that when sports-talk stations are excluded, there is an average of less than two commercial informational stations per market in the top fifty radio MSAs. The average is even lower in terms of minority informational formatted stations. The Katz analysis of the stations in each of the top fifty markets identified 240 stations with an informational format. When "sports" and "sports talk" formatted stations are eliminated from the aforementioned group of stations, less than 100 stations remain. By including the markets that

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138 *Id.*

139 *Id.*

have no minority programming and separating out the entertainment formats from the sample, an average of 0.45 stations per market are providing minority informational content.

Potential minority owners face additional obstacles regarding informational programming targeting large minority audiences. Such programming, which would make stations economically viable, is aimed at an audience that tends to be located in large cities where the value of a station is much higher than in smaller markets. Although the FCC sought to address this issue as part of the eligible entity policy, without the tax incentives or the distress sale policies, which created favorable conditions of the sale of media outlets to minorities, there appears to be little opportunity available for minority groups, including women, to acquire broadcast stations at an increased rate.

Even in the face of these criticisms, the FCC’s focus on smaller broadcasters to increase content diversity is not entirely without merit. The majority of owners operating Hispanic-formatted stations in the top fifty markets are smaller media operations with six or fewer stations, and more than half of these operate only a single station. This finding supports the FCC’s contention that an increase in content diversity is likely the result of smaller broadcast operations with local community ties.\footnote{2007 Order, supra note 48, at 3.}

This study analyzes minority ownership in an indirect way—by focusing on content that is targeted at two major minority groups: Hispanics and African-Americans. As with any study regarding media ownership policy, the best method to test the effectiveness of the current policy would be to examine the actual content of stations. In direct contrast, relying on a measure of format diversity is less desirable than a direct content analysis, but remains a necessary methodological choice given the large number of radio stations that were examined for this study.

Significantly, the FCC considered both television and radio stations under this new policy in attempting to increase minority ownership. However, radio, as the broadcast medium that excels in providing targeted programming to local audiences, should be the primary focus of any broadcast diversity policy. Furthermore, smaller radio companies can be economically viable through providing targeted programming to niche audiences in a local market. Essentially, if the FCC wishes to remain both race and content neutral while enhancing the opportunity for minorities to own media properties, the FCC should focus on the continued creation of smaller media organizations as way to accomplish its stated diversity goals.