

The FCC's Controversial Diversity Initiatives: Diverse Opinions on Who Benefits

Legal Alert
December 28, 2007

Garvey Schubert Barer Legal Update, December 28, 2007.

The FCC has adopted rules which, in the words of the Commission's press release, will "expand opportunities for participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses to own broadcast outlets."

The 12 actions taken by the Commission to help entities with access to financing and availability of spectrum include:

- extending construction permit deadlines for eligible entities that acquire expired permits;
- liberalizing the "equity-debt-plus" rule, which makes investments and loans exceeding 33% of a company's capitalization attributable to the lender or investor, by increasing the threshold to 49%;
- modifying the distress sales policy to allow a licensee who has been designated for hearing on basic qualification issues to sell its station to an eligible entity prior to the commencement of the hearing; and
- allowing grandfathered radio combinations to be sold intact to any buyer that, even if it is not itself an eligible entity, files an application to assign the excess stations to an eligible entity or to an irrevocable divestiture trust within one year.

The above rules benefit an "eligible entity," which the FCC has defined as an entity that qualifies as a small business consistent with the Small Business Administration's revenue-based standards. Commissioners Adelstein and Copps dissented to the eligibility standard on the ground that the plight of minorities and women will not be served.

Commissioner Adelstein said that the definition of "eligible entity" is "so broad that women and minorities are likely to be incidental beneficiaries at best, and at worst, they may actually be harmed by the proposal."

Chairman Martin and Commissioners Tate and McDowell support the Commission's definition and take issue with their Democratic colleagues on whether the rules benefit minorities and women. Recognizing the diversity of views among the Commissioners, the FCC has started a rulemaking proceeding that solicits comments on whether it can or should explain its definition of an eligible entity to include other businesses. Final word on the definition of an eligible

entity will have to wait until the FCC complete its rulemaking proceeding.

The FCC also adopted rules that do not hinge on the definition of what constitutes an eligible entity. The rules include a ban on race or gender in broadcast transactions; a "zero-tolerance" policy for ownership fraud; and a requirement that broadcasters certify at renewal time that their advertising sales contracts do not discriminate on the basis of race or gender ("no-urban dictates" or "no-Hispanic dictates").