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**STATEMENT OF DAVID HONIG**

**EXECUTIVE DIRECTOR,  
MINORITY MEDIA AND  
TELECOMMUNICATIONS COUNCIL**

**BEFORE THE FEDERAL  
COMMUNICATIONS COMMISSION**

**EN BANC ADVANCED TELEVISION HEARING  
MM DOCKET NO. 87-268**

**DECEMBER 12, 1995**

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Mr. Chairman, Honorable Commissioners and colleagues:

Throughout the 87 year history of broadcasting, the airwaves supposedly have belonged to the public at large. Yet even today, minorities own only 31 full power television stations -- 2.7% of the total -- representing less than half of one percent of industry asset value. Owing to the elimination of tax certificates and the disuse or suspension of your other race-conscious licensing policies, minority media ownership is declining rapidly.<sup>1/</sup> This is a national disgrace.

Your highest priority should be to rectify this insidious and unlawful misallocation of one of our greatest national resources. We urge you to license no ATV facilities until you complete your post-Adarand research study and develop a race-conscious plan aimed at insuring that ATV licensees resemble the audiences they will serve. Licensing first and studying minority ownership later will mean locking out minorities forever.

Your race-conscious remedies must be aggressive ones. Twenty-two years of experience with only modest remedies teaches that massive intervention is the only way to bring about meaningful levels of minority ownership "with all deliberate speed."

It is sound economic policy to provide opportunities for inclusion of everyone with talent in a business engaged in the deployment and distribution of talent. By invigorating an inbred industry and reaching underserved minority audiences, minority owners will stimulate the economy and create new jobs.

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<sup>1/</sup> See Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) (rejecting an FCC attempt to cut back on EEO enforcement by noting that the Commission "does not argue, nor could it, that the need for equal employment opportunity has become less urgent" since its EEO rule was adopted in 1970).

You should have four goals in ATV licensing:

First, you should ensure that the licensing process will foster diversity in ownership and viewpoints.<sup>2/</sup>

Second, you should remedy, once and for all, the Commission's long history of official discrimination and ratification of your licensees' discrimination.<sup>3/</sup>

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2/ In Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975), the D.C. Circuit held that minority ownership and service had to be factored into spectrum management decisions. See also Multiple Ownership Rules (Reconsideration), 100 FCC2d 74, 94-95 (1985) (history omitted) (holding that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.") The Supreme Court has recognized that the broadcast EEO rule is justified to promote diversity. NAACP v. FCC, 425 U.S. 662, 670 n. 7 (1976).

3/ It is time for the Commission to acknowledge that its minority ownership and EEO programs are not only desirable instruments to promote diversity, they are compelled by the Equal Protection Clause of the 14th Amendment and the Due Process Clauses of the 14th and 5th amendments. These programs -- and much more -- are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum -- a vast and valuable public resource which the FCC gave away for free only to Whites for two generations.

In the 1940's and 1950's, the Commission routinely handed out licenses to applicants it knew were going to deprive minorities of the training needed to become station owners. Some of these licenses were for noncommercial facilities operated by the de jure segregated state institutions which trained the broadcasters of the day.

One year after Brown v. Board of Education, 347 U.S. 483 (1954), the Commission was still giving full faith and credit to state segregation laws. See Southland Television Co., 10 RR 699, 750, recon. denied, 20 FCC 159 (1955) (awarding a Shreveport VHF license to the owner of segregated movie theaters because such segregation "would be legal under the laws of [Louisiana].")

Ten years later, when the FBI complained about a licensee who encouraged Whites to riot to stop James Meredith from integrating the University of Mississippi, the Commission did nothing even though two people were killed. Letter to Birney Imes, Jr., FCC 65-43 (released May 19, 1965). That same year, it renewed the license of fully segregated WLBT-TV in Jackson, Mississippi in the naive hope that the station would reform itself. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). After being forced by the D.C. Circuit to hold a hearing, the Commission held a kangaroo court proceeding which led the court to intervene again in 1969 and strip WLBT of its license. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

Third, you should take account of the profound difficulties faced by minorities in obtaining access to capital.<sup>4/</sup>

Fourth, you should insure that every licensee selected for ATV will implement an aggressive EEO program.<sup>5/</sup>

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<sup>3/</sup> (continued from p. 2)

In 1970, the Commission showed that it had learned nothing from these cases when it endorsed a television applicant whose principal discriminated against dead Black people in his operation of a cemetery. Chapman Radio and Television Co., 24 FCC2d 282 (1970).

Not until 1973 did the Commission declare that a segregationist lacked the character to be a licensee. Bob Jones University, 32 FCC2d 70 (1973). Even now, the Commission awards comparative credits for broadcast experience, thereby institutionalizing the effects of discrimination in broadcast employment. As the Commission recognized in 1965, "emphasis upon this element could discourage qualified newcomers to broadcasting...since experience generally confers only an initial advantage[.]" 1965 Policy Statement, 1 FCC Rcd 393, 396 (1965).

The Commission's licensing policies did not help matters. Not until 1981 did the Commission get around to eliminating its Ultravision rule, which irrationally and excessively required a full year of working capital as part of an applicant's financial qualifications. Ultravision Broadcasting Company, 1 FCC2d 544 (1965), repealed in Financial Qualifications, 87 FCC2d 200 (1981). When it repealed the rule, the Commission recognized that the Ultravision standard "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses." Id. at 201.

This climate -- exacerbated by a 100% White station brokerage industry -- explains why not one minority held a broadcast license until 1956, and helps explain why no minority won a comparative hearing until 1975.

<sup>4/</sup> Minorities' capital formation difficulties are well documented. See NTIA, "Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries," April, 1995, at 14-16. Owing to discrimination by lenders, suppliers, brokers and advertisers, minorities have generally had to work much harder than most other broadcasters to obtain licenses and operate stations.

<sup>5/</sup> EEO programs are especially critical in the development of a new service, because they obviate the need for years of tortuous struggle to achieve diversity through such inefficient and emotionally charged means as the replacement of vested incumbent employees.

The question of the day is this: which is the most promising algorithm to insure that minorities have a meaningful opportunity to win ATV construction permits: lotteries, comparative hearings, auctions, or a gift to incumbents?

The answer is either comparative hearings or auctions -- provided that either hearings or auctions are structured to facilitate the licensing of minorities and other applicants with strong commitments to public service.

Lotteries have nothing to recommend them. A lottery is nothing but a private auction. The lottery applicants likely to best serve the public have little chance of winning.

Giving the licenses away to incumbents would be a massive rip-off of the public. Imagine the outcry if the FRC had restricted radio licenses to newspaper owners. Or imagine if the FCC had decreed that only radio owners were eligible for the first television licenses. A spectrum giveaway to the nearly all-White incumbents would violate the due process and equal protection clauses by depriving minorities of access to the most valuable resource held in trust by the government and institutionalizing the present effects of past discrimination.<sup>6/</sup>

Comparative hearings are the most rational means to enable the best applicants to be selected. Discovery, and scrutiny by an ALJ, are powerful disincentives to most front and fraud artists and to those with no commitment to public service.

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<sup>6/</sup> If you decide to award licenses to incumbents only, you certainly should consider LPTVs to be equivalent to full power incumbents. According to Abacus Communications, minorities hold 146 (8.3%) of the nation's 1,761 LPTV licenses.

Furthermore, if you give the licenses to incumbents, they should be expected to apply to public service the money they saved by not paying auction prices.

There's no question that race-conscious comparative hearings credits would benefit minorities. Minorities won about 20% of the Docket 80-90 FM licenses. Few of these minorities could have afforded to enter broadcasting any other way.

It's true that comparative hearings often take far too long. But that problem is curable by imposing strict deadlines on the hearing process, by using eligibility criteria to attract the most desirable applicants,<sup>7/</sup> and by developing clear cut and fair comparative standards, such as those we have proposed in the comparative hearings docket.

These factors best predict service in the public interest:

- (1) minority ownership, in its own right;
- (2) absence of attributable media interests;
- (3) strong public service backgrounds by an applicant's voting principals, irrespective of the community in which that public service was provided;
- (4) a strong history of providing equal employment opportunity;
- (5) aggressive proposals to foster the inclusion of minorities and women in program service, employment and training; <sup>8/</sup> and

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<sup>7/</sup> The AM clear channel eligibility criteria, in effect from 1983 to 1985, were among the most effective tools the Commission ever developed to promote minority ownership. Minorities, public broadcasters and daytimers were eligible for new facilities; if no members of these groups applied, those who were not members of these groups could do so. Before the Commission eliminated them because they had supposedly "served their purpose", these criteria generated thirteen minority owned stations. Deletion of AM Acceptance Criteria, 102 FCC2d 548 (1985), repealing Clear Channels, 78 FCC2d 1345, recon. denied, 83 FCC2d 216 (1980), affirmed sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982).

You should seriously consider using eligibility criteria once again, provided that they include waivers to accommodate truly exceptional, creative proposals which might not otherwise be eligible for first-round consideration.

<sup>8/</sup> This criterion would provide a strong incentive for EEO efforts, making it less likely that you will later need to expend considerable resources to correct licensees' EEO misconduct at renewal time.

- (6) serious proposals to incubate minority applicants for other ATV channels, using the incubation plan proposed by NABOB in the minority ownership proceeding. 2/

Auctioning off the spectrum would insure that only the most well financed corporations would receive the licenses. Indeed, an auction would probably shut out most of the 31 minority owned full power NTSC licensees, given their lack of access to the development capital needed to bid in an auction and pay the cost of migration. It would be tragic to lose any of these 31 good broadcasters.

Nonetheless, if you decide to use auctions, you should design in a substantial credit for minority ownership of the type used successfully in IVDS licensing. You should also build in credits paralleling those you would use in comparative hearings, including civic participation, EEO proposals and minority ownership incubation. And you should work with Congress to develop legislation authorizing the application of auction proceeds to public broadcasting, children's programming and a minority ownership equity fund.

Finally, MMTC expresses its concern that the phase-out period for NTSC not be too swift. The poor depend on television as their window to citizenship. Low income Americans must not be forced to spend hundreds of dollars on high-tech equipment they didn't ask for.

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2/ In comparative hearings, the Commission has routinely awarded a minority sensitivity credit to nonminorities who can show a history of outstanding responsiveness to minority needs. TV 9, Inc. v. FCC, 495 F.2d 929, 937-38 (D.C. Cir. 1973); Chase Communications Co., 100 FCC2d 689, 692-93 (Rev. Bd. 1985); San Joaquin TV Improvement Corp., 96 FCC2d 594, 603 (Rev. Bd. 1983), recon. denied, 96 FCC2d 617 (Rev. Bd. 1984). You should extend this principle to ATV licensing.

You have a unique opportunity to break dramatically with the past, and to earn your place in history as the Commission which dramatically advanced the goal of diversity. There's no better place than this, and there's no better time than now.

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