HOW THE FCC HELPED EXCLUDE MINORITIES FROM OWNERSHIP OF THE AIRWAVES

David Honig
Executive Director
Minority Media and Telecommunications Council
3636 16th Street N.W., Suite B-366
Washington, D.C. 20010
dhonig@crosslink.net

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Today I am going to speak of ancient history, recent history and future history to help us understand why people of color, 34% of the nation's population, now hold less than one and a half percent of the asset value of our nation's broadcasting industry.

Why is diversity in broadcasting so worthy of our attention?

Because broadcasting is the most influential industry in the nation. It is our signature export. It defines and facilitates our democracy, it drives our culture, itsets our policy agenda, and it brings the promise of equal opportunity within our grasp.

As the Executive Director of MMTC, I often appeal to FCC commissioners to support broadcast ownership diversity because diversity promotes competition and economic growth.

Certainly the exclusion of people of color from ownership of the airwaves is profoundly anti-competitive. What could be a more inefficient deployment of resources than having the entrepreneurial, managerial and creative wealth of one third of the country unable to find expression in the nation's most influential industry?

Still, this "business case for diversity" leaves the soul hollow, for it presumes that the attainment of justice must depend on whether justice happens to be profitable.

But what if it isn't? Suppose, however improbably, that diversity in broadcasting were found to reduce our gross domestic product? Would that justify segregation of the airwaves?

To answer that question, let us recall the words of the nation's greatest exponent of moral clarity. In his address at Washington's National Cathedral a month before his assassination, Dr. Martin Luther King, Jr. declared that "cowardice asks the question, is it expedient? And then experience comes along and asks the question, is it politic? Vanity asks the question, is it popular? Conscience asks the question, is it right?"

And that is the point. Diversity in broadcasting is desirable not because it promotes competition, not because it is popular, or even because it is compelled by the law, but rather because segregation is uncivilized and morally wrong, while diversity is the earmark of democracy.

Six Ways The FRC And FCC Froze Minorities Out Of Broadcasting, 1930-2002

Today I will demonstrate that for three generations the FCC waged a deliberate campaign calculated specifically to ensure that people of color would be barred from membership in the nation's most exclusive private club - the radiofrequency spectrum used by the nation's instruments of electronic mass communications. And unfortunately, the FCC continues with its anti-diversity campaign today.

In 1995, the FCC agreed with MMTC that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975" and therefore "special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." That was a rare moment of candor, never repeated since.

Let's go back to 1956 - fifty years ago when as the FCC acknowledged there was exactly one radio station in the United States owned by people of color.

Consider this though: in 1956 there were over 250 African American owned and nearly 100 Hispanic owned weekly newspapers. No FCC license is necessary in order to publish a newspaper, and at the time the cost of operating a weekly newspaper was about the same as the cost of operating a radio station.

So why did people of color own so few radio stations when they were able to own so many newspapers?

The answer is that the FCC acted as a gatekeeper to prevent people of color from gaining a foothold in the broadcasting industry. The FCC's behavior imposed what economists refer to as a "market entry barrier," under which regulation acts as a filtering device to guarantee entry by favored groups and to discourage entry by disfavored groups.

Certainly Congress intended no such thing. Congress created the FCC in 1934 "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, <u>without discrimination</u>, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]"

How did the FCC fail so miserably in doing the job Congress created it to do? And was its failure an act of omission or commission?

The answer is commission. The FCC used six different devices to maintain segregation of the airwaves, and I am going to give you the ugly history of all six of them.

Device #1: Simply Refusing To Issue Licenses to Minorities

Let's begin in 1930, three years before the FCC was born. In that year, the African American owned Kansas City American newspaper applied to the Federal Radio Commission for a license to operate a radio station.

The newspaper was the only applicant for the frequency. There were no engineering deficiencies in its application, and the newspaper was qualified in every respect. Further, the Radio Commission never rejected license applications unless the applicant was a criminal, and the Radio Commission always granted applications filed by newspapers.

Nonetheless, the Radio Commission turned down the Kansas City American's application specifically because the newspaper proposed to offer programming that would address the needs of the African American community. That was impermissible, the Radio Commission maintained, because a radio station was expected to serve the "general population."

Of course the Radio Commission did not right come out and emblazon in a published opinion that it wasn't going to give Black people a radio license because they were Black. But a brief foray into legal archaeology discloses that the Radio Commission's "service to the general population" justification was nothing but a pretext for official discrimination.

You see, at the same time that the Radio Commission was refusing to grant a license to African Americans who wanted to serve African Americans, the Commission was not requiring other broadcasters to address the needs of African Americans – and they didn't. Thus, what the Radio Commission referred to as the "general population" – its euphemism for White Americans - received exclusive service from incumbent licensees, and at the same time White broadcasters were insulated from competitors who wanted to serve people of color.

It follows that people of color did not even receive the supposedly "separate but equal" service contemplated by the 1896 case Plessy v. Ferguson, which was good law in 1930. At least in Plessy the African American train passenger arrived at his destination at the same time as the other passengers. By contrast, the Radio Commission didn't allow people of color onto that day's information highway at all – either as producers or as consumers of information.

But there is a dead giveaway that prejudice and not principle was driving federal radio licensing policy: only one other group was denied radio licenses on this "service to the general population" pretext. Let's see if you can guess what that group might have been.

Here is a clue: the decisions of the FCC denying these applications were handed down in 1936, 1938 and 1940, and the cities of license were to have been Chicago, Detroit and Brooklyn, NY.

Another clue: in each case, the applicants intended to broadcast in Yiddish, Polish and Russian.

Our research has turned up no cases in which any other qualified applicants, except African Americans or Jewish Americans, were refused broadcasting licenses.

Device #2: Ratifying The Segregationist Policies Of State Governments

Until the 1980s, the FCC routinely assisted in state governments' schemes to discriminate against historically Black colleges in noncommercial radio and television service. By systematically awarding licenses and license renewals to exclusively or overwhelmingly White state universities, the FCC denied two generations of minorities the opportunity to obtain the education, experience, exposure and networking necessary for success in the broadcasting industry.

How effective was the FCC in ratifying state-sponsored segregation in public education? MMTC has found that the 28 radio stations owned by historically Black colleges signed on in 1980 on the average; but the 29 radio stations owned by predominately White state colleges in the same states signed on in 1970 on the average.

In addition, the White schools' radio stations' mean power level was 20% more than the Black schools' stations' mean power level. The White schools' mean tower height was almost two and a half times the Black schools' stations' mean tower height.

So the Black colleges got broadcast licenses 10 years later, and when they did, they got licenses for vastly inferior facilities.

Device #3: Giving Licenses To Rabid Segregationists

The FCC routinely granted, then renewed without investigation, the licenses of hundreds of radio and television stations owned by some of the most vicious segregationists in the nation – people who were never going to hire and train minorities, much less sell stations to them.

The FCC knew very well that it was regulating a segregated industry. FCC commissioners speak to state broadcast associations all the time. How could the commissioners not have noticed that no minorities attended these meetings?

One would think that the FCC's character policies would have required denying segregationists' broadcast applications while favoring those of integrationists. Incredibly, the exact reverse was true, as is shown from a 1955 case in which the FCC held that segregationists have the character to be licensees, and a 1963 case in which it found that integrationists lacked the character to be licensees.

The 1955 decision, Southland Television, arose in a television comparative licensing case. The Commission had to decide which of three applicants would be awarded, for free, a permit worth millions of dollars with which to construct what would become the ABC affiliate in Shreveport, Louisiana.

One of the applicants, Southland Television, owned and operated movie theaters. Louisiana law governing movie theaters assumed that theaters had two stories, like the 19th century opera houses the theaters emulated. The law required the admission of all races to theaters so long as the theater owners kept Black people in the balcony.

Southland Television did not want African Americans to patronize its theaters at all, but the company faced a problem keeping them out: the Louisiana theater law's "balcony rule."

To get around the balcony rule, the company built Louisiana's first one-story movie theaters. The company also operated Louisiana's only all-White drive-in movie theaters, and if you know what goes on in a drive-in movie theater you will realize what this segregation policy was really all about.

A competitor for the television license, Shreveport Television, was the nation's first television station applicant to include African American shareholders. Shreveport Television asked the FCC to disqualify Southland because, judging from Southland's segregated movie theaters, it could be predicted to a moral certainty that Southland would deny African Americans the opportunity to sit in the studio audiences for live productions at the television station.

Now that was an extraordinary argument, especially in 1955, but the FCC was unimpressed. It ruled that there was no evidence that "any Louisiana theaters admit Negroes to the first floor," nor any evidence that "such admission would be legal under the laws of that state."

The FCC knew very well the first principle of federalism - that a federal law trumps a conflicting state law. Therefore, the Southland decision has to mean that the FCC regarded state segregation laws as presenting no conflict with the Communications Act. A segregationist had the character to be an FCC licensee.

Eight years later, in 1963, the FCC found that being an integrationist meant that a broadcaster did not have the character to be an FCC licensee. That decision was rendered in the case of Broward County Broadcasting, which involved an AM station, WIXX, licensed to Oakland Park, Florida, a suburb of Ft. Lauderdale.

The substantial African American population of Ft. Lauderdale received no Black-oriented programming from any station. That gave WIXX's owners an idea: they decided to devote 17% of the station's broadcast day to Black-oriented news, public affairs and music.

This programming did not go unnoticed by the City of Oakland Park, which complained to the FCC that WIXX was offering a format the city did not need because "the Negro population to be catered to all resides beyond the corporate limits of Oakland Park." "We don't want them moving here and we don't want to hear their music either," the City did not add.

The FCC is not permitted to regulate program content. Nonetheless, the FCC threw WIXX into a revocation hearing on the pretext that the station had changed its programming plans from the 100% "general audience" format originally proposed in its licensing application. The FCC had never before, nor since, threatened to revoke a license because of a change in programming plans.

Faced with the probable loss of its license, WIXX dropped its Black-oriented programming, and the FCC then quietly dropped the charges, proving that the FCC's real interest all along was the suppression of Black-oriented programming and not the licensee's "character" at all.

Device #4: Refusing To Punish Lawless Behavior By Segregationists

Two cases, each decided in 1965, illustrate how the FCC protected segregationist broadcast applicants and licensees.

The first of these cases is called Columbus Broadcasting Company, and I hope they're not serving food later because every time I talk about the Columbus case I lose my appetite.

The backstory of Columbus was James Meredith's 1962 enrollment in the University of Mississippi. The day before Meredith tried to enroll, President Kennedy federalized the Mississippi National Guard to protect Meredith and to prevent bloodshed. Yet even in the face of this, WCBI-TV and WCBI urged their viewers and listeners to show up in Oxford *en masse* to prevent Meredith from enrolling.

Predictably, a mob did show up, and there was a lot of bloodshed. The ensuing riot caused $2,000,000 in damage, and two people were killed.

Nonetheless, the Commission merely "admonished" the stations, ignoring the obvious fact that broadcast licenses are not conferred so they can be used to incite riots. The Commission's inaction was especially startling given the very unlikely source of the complaint: J. Edgar Hoover's Federal Bureau of Investigation.

The second 1965 case in which the FCC refused to protect the public from segregationists was Lamar Life Insurance Company, named after the company that owned WLBT-TV in Jackson, Mississippi.

Since signing on the air in 1953, WLBT broadcast only the White Citizens Council's viewpoint on civil rights. WLBT went so far as to display a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed on the CBS Evening News with Douglas Edwards.

The FCC renewed the license anyway, theorizing that WLBT might do a better job if given the chance. But the station owner was unrepentant, making it clear that it had no intention of doing anything differently.

Lamar Life became the famous UCC I case – Office of Communication of the United Church of Christ v. FCC (1966), in which the District of Columbia Circuit of the U.S. Court of Appeals ordered the FCC to hold a hearing on the license renewal, and also famously held that listeners and viewers had standing to challenge a broadcast license.

The FCC wasn't paying attention to the Court, however. After UCC I the FCC held a one-sided, kangaroo court mockery of a hearing, then renewed WLBT's license again. In the 1969 case known as UCC II, the Court lost its patience with the FCC and ordered it to deny WLBT's license renewal. The Court had never before taken such an extraordinary action, but this time it held that the administrative record was "beyond repair."

As most of you know, UCC I and UCC II were brought by Fordham University Professor Everett C. Parker and we are all in his debt.

The Commission's new antidiscrimination policy - forced on it by the court in UCC II - was applied inconsistently at best. In a 1971 Birmingham, Alabama television comparative case known as Chapman Broadcasting, the Commission had before it several applicants seeking construction permits. One applicant, Alabama Television, had a major shareholder, John Jemison, who owned a Birmingham cemetery. Jemison had participated in the cemetery's 1954 decision to continue its original 1906 policy of excluding African Americans' dead bodies.

This horrible policy came to light when the cemetery turned away the body of an African American Vietnam war hero who had just sacrificed his life rescuing other soldiers.

These facts would have shocked the FCC's conscience, if it had a conscience. Instead, the FCC found "extenuating circumstances" in Alabama Television's claim that the cemetery would have been sued by White cemetery plot owners if this war hero's body had been lain to rest there.

Although the FCC ordered a hearing, it limited the issues to whether the applicant had covered up this scandal. The FCC avoided the more basic question of whether a rabid segregationist had the moral character to own a television station in the first place.

Another way the FCC protected segregationists was by failing to enforce its only rule aimed at preventing discrimination – the equal employment opportunity (EEO) rule. Adopted in 1969 as a result of a long campaign waged by Dr. Parker, the EEO rule barred discrimination by FCC licensees and required them to recruit minorities and women. But in the 29 years during which the EEO rule was in effect, the Commission barely enforced it. Only fourteen stations ever went to hearing on allegations of discrimination, and not one of them lost a license because of race or gender discrimination.

It's not like there hasn't been any employment discrimination in the media. According to a new book by faculty in the Indiana University School of Journalism, The American Journalist in the 21st Century, the percentage of African Americans in full-time reporting positions in 1971 was just 3.9%. At that time, about 7% of African Americans had college degrees. By 2002, 24% of African Americans had college degrees – and the percentage of African Americans in full time reporting positions had changed as well – it declined to 3.7%.

Further, look what's happened to minority employment in radio news since the FCC stopped almost all EEO enforcement. According to the Radio Television News Directors Association (RTNDA), minority employment in radio news declined from 14.7% in 1995 to 6.4% in 2005.

The picture is even worse, however. MMTC went behind the RTNDA's figures and calculated that the representation of people of color in English language, non-urban radio is about two tenths of a percentage point (0.2%) – virtually zero.

What does this mean? It means that with the end of FCC EEO enforcement, minorities in radio news have undergone an almost complete purge.

We pretty much know how many broadcasters discriminate in employment. In 2002, the Ford Foundation produced a study, The Reality of Employment Discrimination in America - 1999 – which found that 24% of broadcasters systematically discriminated against African Americans.

Under the Communications Act, a discriminator is supposed to be unqualified to hold any FCC authorization. Yet the FCC decided to ignore almost unassailable evidence that thousands of FCC licensees were unqualified to be licenses.

All of this calls to mind Dr. King's 1967 observation that "[l]aws that affect the whole population - draft laws, income-tax laws, traffic laws – manage to work even though they may be unpopular, but laws passed for the Negro's benefit are so widely unenforced that it is a mockery to call them laws."

Device #5: Using Discriminatory Factors To Decide Who Wins Broadcast Licensing Cases

Southland was one of the first of the television comparative hearings, and Chapman was among the last. Today, virtually all of the broadcast spectrum in the United States has been given away. The FCC awarded minority owned companies exactly two out of about 1,700 free full power television licenses. Thus the FCC presided over a 99.9% set-aside for White people in television ownership.

Only about 100 minority owned applicants ever won construction permits for new radio facilities, so there was about a 99.2% set aside for Whites people in radio ownership.

For decades, few minority entrepreneurs could bear the sheer cost of a comparative hearing. The few who could do so found that the rules were written to exclude them. Although briefly there was a hearing credit for racial diversity in an application, that credit was usually offset by other credits for "broadcast experience" and "past broadcast record" that minorities seldom had an opportunity to acquire.

Another impediment to minority hearing applicants was the financial showing the FCC required in order to deem an applicant qualified.

In 1965, in a case with the modernistic name Ultravision, the FCC announced that it would require applicants to have reasonable assurance of sufficient financing to underwrite construction and a full year of broadcast operation. Applicants' financial showings had to assume that during that first year their stations would generate zero revenue. In other words, this supposedly expert agency assumed that a new broadcast station would not air a single paid advertising spot for a full year.

When the Commission finally repealed Ultravision in 1981, it found, with dry understatement, that Ultravision "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."

Device #6: Ignoring Civil Rights Organizations' Proposals In Media Ownership Structure And Engineering Proceedings

Not only have minorities secured few facilities, those they did secure were usually technically inferior – such as low power, directional AM stations on the high end of the band, or low power FMs with severe tower height limitations.

A 1975 D.C. Circuit decision, Garrett v. FCC, instructed the Commission to consider the effects of its spectrum management policies on minority ownership. Instead, the Commission in the 1980s and early 1990s issued four rulemaking decisions in which it simply disregarded the proposals filed by civil rights organizations, failing in two instances even to note in the dockets that the proposals had ever been filed.

This was a flagrant violation of the 1945 Administrative Procedure Act, of course, and as we'll see in a few moments, this wasn't the last time the FCC dealt with civil rights organizations' pleadings by throwing them in the garbage.

The FCC's Minority Ownership Policies And Their Demise

During a brief moment in the history of broadcasting, the FCC adopted and implemented modest but worthwhile policies to promote minority ownership.

A 1973 court decision, TV 9, Inc. v. FCC, required the FCC to take racial diversity into account in comparative hearings. In 1978, in response to TV 9, the FCC adopted two policies, distress sales and tax certificates. Distress sales permitted broadcasters to escape a hearing by selling their stations to minorities for a 25% discount. Tax certificates enabled broadcasters selling stations to minorities to postpone capital gains taxes. These policies lifted minority broadcast ownership from 60 stations in 1978 to over 300 by 1995.

To put these numbers in context, those 300 stations represented just over 1% of the broadcasting industry's asset value.

But in that fateful year, 1995, Congress voted to repeal the tax certificate policy. Then two months later, in the Adarand case, the Supreme Court made it much more difficult for any race-conscious federal program to withstand judicial review.

On the heels of these losses, two D.C. Circuit decisions invalidated the FCC's EEO rules. These developments have left advocates for diversity searching for new ways to steer the FCC back onto a civil rights heading.

In December 2000, FCC Chairman William Kennard released five research studies on minority ownership that he hoped would build a legal framework for the restoration of minority ownership policies. Yet a month later, in January 2001, the Commission declined to consider MMTC's minority ownership proposals in the television local ownership proceeding because, the Commission said, it had not yet evaluated the December 2000 minority ownership studies.

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