

HISTORY OF FCC DIVERSITY INITIATIVES

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The Keys To Knowing How To Promote Diversity In Telecom Regulation Today

Even a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears.

Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924), cited in Geller v. FCC, 610 F.2d 983, 980 (D.C. Cir. 1979)

A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition.

Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second R&O and Third NPRM, 17 FCC Rcd 24018, 24129 (2002) (subsequent history omitted) (Separate Statement of Commission Kevin J. Martin)

The FCC's Original And Hostile Intent When It Came To Diversity

Chicago Broadcasting Association, 3 FCC 277 (1936), Voice of Detroit, Inc., 6 FCC 363 (1938) and Voice of Brooklyn, 8 FCC 230 (1940), in which the FCC refused to issue broadcast licenses to otherwise qualified applicants because the applicants proposed to offer some programs in Yiddish and other Eastern European languages. This line of cases met its end on December 7, 1941.

Southland Television, 10 RR 699, recon denied, 20 FCC 159 (1955), in which the FCC found that a segregationist theater owner possessed the character required to hold a television license. In its gymnastics, the FCC gave full faith and credit to a Louisiana state law permitting segregation, notwithstanding that law's obvious conflict with the nondiscrimination clause found in the first section of the Communications Act of 1934, 47 U.S.C. §151.

Lamar Life Broadcasting Co., 38 FCC 1143 (1965) ("Lamar Life") (renewing the license of WLBT-TV, Jackson, MS, notwithstanding overwhelming evidence of racial discrimination in programming, on the theory that a license renewal would permit this White Citizens Council-leader of a licensee to do better during the next license term)

Columbus Broadcasting, 40 FCC 641 (1965), in which the FCC decided the fate of a broadcaster who, trying to prevent James Meredith from enrolling at the University of Mississippi, incited a riot during which the University was burned down and two people were killed. The FCC determined that an admonishment was adequate, ostensibly because this was a case of first expression.

Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (1965) (comprehensively regularized the criteria for choosing new broadcast permittees, but somehow forgot to mention minority ownership)

Ultravision Broadcasting Company, 1 FCC2d 545 (1965) (“Ultravision”) (created irrational financial qualifications standards for new broadcast permit applicants. The standards were so extreme that only independently wealthy applicants could meet them.)

The FCC Is Dragged Into The 19th Century

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (“UCC I”) (reversing Lamar Life; requiring FCC to hold a hearing on allegations of racial discrimination in programming by WLBT-TV, Jackson, MS, and finding that television station viewers had Article III (and administrative) standing to challenge a broadcast license on this basis); accepting remand, 3 FCC2d 784 (1966), silly decision reaffirming Lamar Life, 14 FCC2d 495 (ALJ 1967), aff’d, 14 FCC2d 431 (1968), reversed and vacated sub nom. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (“UCC II”) (ordering the FCC to deny the renewal of the WLBT-TV license, and holding that the FCC exhibited a “curious neutrality in favor of the licensee.”)

Nondiscrimination in the Employment Practices of Broadcast Licensees (MO&O and NPRM), 13 FCC2d 766 (1968) (proscribing racial and gender discrimination in broadcast employment) and Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices (R&O), 18 FCC2d 240, 241 (1969) (adopting broadcast EEO outreach requirements)

The D.C. Circuit Pushes The FCC To Focus On Minority Ownership

TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert denied, 418 U.S. 986 (1974) (holding that minority ownership must be a factor in broadcast licensing)

Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) (holding that minority ownership must be a factor in the FCC’s administration of its spectrum management policies)

The FCC Tentatively Becomes Part Of The Solution

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978) (adopting the Tax certificate Policy and the Distress Sale Policy); but see Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1 (1978) (declining to adopt Commissioner Benjamin Hooks' proposal for a 45 day advance notice of the possible sale of a broadcast station, which Commissioner Hooks believed necessary to break through the "old boy network" that prevented minorities and women from learning that stations were for sale).

Clear Channel Broadcasting in the AM Broadcast Band (R&O), 78 FCC2d 1345, 1368-69 (1980), recon denied, 83 FCC2d 216 (1980), aff'd sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982) ("Clear Channels") (including minority ownership as a justification for waivers of acceptance criteria for construction permit applications that propose new service on domestic Class I-A clear channel AM frequencies)

Revision of Application for Construction Permit for Commercial Broadcast Station, 87 FCC2d 200 (1981) (repealing Ultravision, discussed above, and finding that the FCC can consider the impact of an apparently race-neutral rule on minority ownership).

Commission Policy Regarding The Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982) (adopting one of the recommendations of a federal advisory committee (the "Rivera Commission" after its Chair, FCC Commissioner Henry Rivera) to apply the minority ownership policies to companies for which voting control vested in minorities, albeit the minority principals possessed only 20% of the shareholder equity. This was a means of enabling legitimate minority entrepreneurs to secure financing.)

Waters Broadcasting Co., 91 FCC2d 1260 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601, cert denied, 470 U.S. 1027 (1984) (rare case expressly choosing a minority non-local applicant over a local non-minority applicant for a new FM construction permit. The minority applicant, Nancy Waters, then built the station and ran it successfully – in an all-White community – for 18 years.)

Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 FCC2d 74, 94 (1985) (subsequent history omitted) (holding that minority ownership is a factor in fashioning structural multiple ownership rules, and adopting the "Mickey Leland Rule" -- a two station minority ownership "bump up" above the number of AM, FM or TV stations a company was then permitted to own in a market)

The FCC Exhibits Instability On Whether To Advance Diversity

Deletion of AM Acceptance Criteria in §73.37(e) of the Commission Rules (R&O), 102 FCC2d 548, 558 (1985), recon denied, 4 FCC Rcd 5218 (1989) (repealing Clear Channels)

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 (adopted December 17, 1986, issued December 30, 1986) (suspending the distress sale policy and the consideration of minority ownership in comparative hearings. On December 18, 1986, MMTTC was founded for the purpose of getting this decision overturned, which we did.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (“Metro Broadcasting”) (finding that the distress sale policy and the consideration of minority ownership in comparative hearings satisfied intermediate scrutiny; the government's purpose was promoting diversity in programming (cf. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) (dictum to the same effect concerning the FCC's EEO regulations))

A Prescient Warning Of Things To Come

Religious Broadcasting Network, 3 FCC Rcd 4085, 4088 ¶8 (Rev. Bd., by Member Norman Blumenthal, 1988):

The Commission's application processes are currently plagued with fraudulent applications where in the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail.... Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the very lowest echelon.

Congress And The Courts Push Diversity Back

Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1992) (“Bechtel II”) (invalidating the “integration of ownership into management” comparative factor for broadcast construction permit comparative hearings. The subtext of the Bechtel cases was that the FCC had proven itself impotent to deter abuse of its minority and local ownership policies in comparative hearings.)

Deduction for Health Insurance Costs of Self-Employment Individuals, Pub. L. No. 104-78, §2, 109 Stat. 93, 93-94 (1995) (attaching repeal of the Tax Certificate Policy to a bill affecting 1995 Form 1040 that hit President Clinton's desk on April 13, 1995. Between 1978 and 1995, 200 minority owned stations came into being through the Tax Certificate Policy. There is no evidence that even one was the product of fraud or abuse.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that strict scrutiny applies to equal protection evaluation of federal race-conscious programs, and thereby overruling Metro Broadcasting's holding that intermediate scrutiny applies to review of these federal programs)

Lutheran Church/Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), petition for rehearing denied, 154 F.3d 487, petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir. 1998) and MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, petition for rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, 534 U.S. 1113 (2002) (striking, on equal protection groups, two sets of mass media EEO rules)

Congress Opens The Door For New FCC Initiatives

Auctions and the Designated Entity Program; see Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures (FNPRM), FCC 06-8 (February 3, 2006)

Telecommunications Act of 1996: amendment to 47 U.S.C. §151, providing that the FCC was created inter alia, “so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service” (emphasized language added in the 1996 Act)

Telecommunications Act of 1996: adopting 47 U.S.C. §257, which requires the FCC to report to Congress every three years on its process in eliminating “market entry barriers” for small businesses. The FCC’s next Section 257 report is due this year.

The FCC Slowly Begins Anew To Consider How To Promote Diversity

The Section 257 Studies – e.g. Ivy Planning Group, “Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing – 1950 to Present” (2000); see Staff Executive Summary (December 10, 2000)

The Advisory Committee on Diversity for Communications in the Digital Age. See Achievements of the FCC’s Advisory Committee on Diversity for Communications in the Digital Age, February 16, 2005

Why This Is Important

Dr. Martin Luther King, “Reawakening Through a Great Revolution,” Delivered at the National Cathedral, Washington, D.C., March 31, 1968, Congressional Record, April 9, 1968 (copyright The Estate of Martin Luther King, Jr.):

Through our scientific and technological genius, we have made of this world a neighborhood and yet we have not had the ethnical commitment to make of it a brotherhood. But somehow, and in some way, we have got to do this. We must all learn to live together as brothers or we will all perish together as fools. We are tied together in the single garment of destiny, caught in an inescapable network of mutuality. And whatever affects one directly affect all indirectly. For some strange reason I can never be what I ought to be until you are what you ought to be. And you can never be what you

ought to be until I am what I ought to be. This is the way God's universe is made; this is the way it is structured.