

The State of Minority Ownership in America

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Throughout the latter half of the twentieth century Blacks and Hispanics have struggled to ensure that their opinions have an outlet. Seeing their plight the FCC has tried to ensure greater minority opinion in the media by implementing affirmative action policies. Since the inception of these programs there has been much disagreement as to the effects and constitutionality of the practices. Two of the more controversial policies were the FCC's decision to grant preference to minority ownership bids for licenses for new radio or television broadcasting stations, and the decision made by the commission to allow radio or television broadcasters with questionable license qualifications, to avoid an FCC investigation of their actions by making a "distress sale" of their licenses to a legitimate minority outfit. The controversial schemes, though mostly upheld by the courts were not as effective as the FCC hoped. The FCC has since tried to find other means to promote minority opinion in mainstream media like issuing tax certificates but the schemes though beneficial, were repealed by congress. The focus of this research paper will be to determine how the minority ownership rules, implemented by the FCC, have affected the presence of minority opinion in mainstream media.

In April 1977, the FCC held a conference to determine how best to increase the presence of minority opinion on broadcast. Statements were heard from varying viewpoints; the FCC concluded after the conference that:

“[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and

listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.¹

In an attempt to respond to the issues raised the conference the FCC adopted a Statement of Policy on Minority Ownership of Broadcasting Facilities². Since the inception of the statement there have been numerous court cases that have challenged the right of government bodies to impose restrictions on the basis of candidates' race.

The constitutionality of the minority ownership rules were tried in 1990 when Alan Shurberg on behalf Shurberg Broadcasting sued the FCC claiming that the distress sale policy included in the FCC Statement of Minority Ownership Policy violated his right of equal protection guaranteed by the constitution. The clause referred to in the case allowed minorities to have preference when purchasing a media agent that had put out a "distress signal." "The standards of the Federal Communications Commission's distress sale policy provide that certain minority groups shall have an absolute preference over all other citizens in qualifying for a broadcast license that is designated for hearing. The preferred minority groups are defined and restricted to those who are: black, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction³" In short, the distress signal allowed broadcast companies that could not meet FCC policy to resell for 75% of market value to avoid action on the part if the commission. The FCC would then give

¹ Statement on the Policy of Minority Ownership of Broadcast Facilities, 1978

² Statement on the Policy of Minority Ownership of Broadcast Facilities, 1978

³ *Astroline Communications Co., Petitioner v. Shurberg Broadcasting No. 89-700 Supreme Court of the United States 493 U.S. 1018; 110 S. Ct. 715; 107 L. (1990)*

minority owned companies preference among groups that placed bids on media agents using their distress sale signal.

The FCC granted the license for the construction of the facility to Astroline, mostly because it had the advantage of having a Hispanic owner. The lower court agreed with Shurberg's complaint of the FCC's decision and declared the FCC policy unconstitutional. The FCC appealed the ruling and the case was eventually heard by the Supreme Court. The Supreme Court reversed the decision of the lower court deciding that benign race conscious measures were permissible if they served important government objectives. The court concluded that the measures taken by the FCC were benign and achieved the important government objective of increasing diversity of opinion in the media.

The Shurberg decision was upheld by a narrow vote of 5-4 and many justices voiced stern criticism of the decision. Justice O'Connor's wrote that "the means chosen to achieve the government's asserted interest could not plausibly be deemed narrowly tailored." She questioned the FCC's assumption of a "particularly strong correlation of race and behavior." She also made note of the availability of "race-neutral and untried means of directly accomplishing the asserted governmental interests, such as, in part, providing race-neutral financial and informational measures, or developing an effective ascertainment policy to guarantee programming that would reflect underrepresented viewpoints. In all, the "repeated" focus on ownership supported the inference that the Commission sought to allocate licenses based on race, rather than to increase diversity of viewpoints.⁴" This dissent was echoed when the courts heard a similar case in 1990.

⁴ Astroline Communications Co., Petitioner v. Shurberg Broadcasting No. 89-700 Supreme Court of the United States 493 U.S. 1018; 110 S. Ct. 715; 107 L. (1990)

Metro Broadcasting sued the commission for violating its right to equal protection guaranteed by the constitution. The FCC gave preference to Rainbow broadcasting for a license that Metro had applied for as well because Rainbow was 90% minority owned. Both Rainbow and Metro Broadcasting had applied to the FCC for a license to operate a UHF station in Orlando Florida. The board concluded after deciding the license that “Although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civil participation advantage.”⁵ The license to construct the station was denied to Metro and awarded to Rainbow.

The Supreme Court eventually upheld the decision made by the FCC as it concerned Rainbow Broadcasting because it was determined that the FCC used benign race conscious measures in order to achieve the important government objective of increasing diversity of opinion.

The court concluded after deciding Metro and Shurberg in article (c) of the appendix of the case that:

(c) “The minority ownership policies are substantially related to the achievement of the Government's interest in broadcast diversity. First, the FCC's conclusion that there is an empirical nexus between minority ownership and greater diversity, which is consistent with its longstanding view that ownership is a prime determinant of the range of programming available, is a product of its expertise and is entitled to deference. Second, by

⁵ Winter Park Communications, Inc., Appellant v. Federal Communications Commission, Appellee, Rainbow Broadcasting Company, Metro Broadcasting Inc, Inc., Appellant v. Federal Communications Commission, Appellee, Rainbow Broadcasting Company and Winter Park Communications, Inc, Interveners 277, U.S. App. D.C. 134; 873 F.2d 347; 1989 U.S. App. (1989)

means of the recent appropriations legislation and by virtue of a long history of support for minority participation in the broadcasting industry, Congress has also made clear its view that the minority ownership policies advance the goal of diverse programming. Great weight must be given to the joint determination of the FCC and Congress.⁶

The opinion on the case also addresses the assumption that critics have that the FCC is merely enforcing the stereotype that there is programming for minorities and that programs aired on these stations will provide only so called minority programs which are exclusively attractive to minority viewers. The court agreed with the FCC that minority ownership rules would increase program diversity and maintained further “that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity.”⁷ The court went on to note that “This judgment is corroborated by a host of empirical evidence suggesting that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. The FCC's policies are thus a product of analysis rather than a stereotyped reaction based on habit.”⁸

⁶ Metro Broadcasting, Inc. v. Federal Communications Commission et al No. 89-453 Supreme Court of the United States 497 U.S. 547; 110 S. Ct. 2997; 111 L. Ed. 2d 445; 1990

⁷ Metro Broadcasting, Inc. v. Federal Communications Commission et al No. 89-453 Supreme Court of the United States 497 U.S. 547; 110 S. Ct. 2997; 111 L. Ed. 2d 445; 1990

⁸ Metro Broadcasting, Inc. v. Federal Communications Commission et al No. 89-453 Supreme Court of the United States 497 U.S. 547; 110 S. Ct. 2997; 111 L. Ed. 2d 445; 1990

Although it appears that the FCC has had several victories at the court level the effects have been very limited. The distress sale policy has had minimal overall effect because the distress signal is rarely used. In fact the policy was only used 42 times since its inception in the 1970's, about 14 times a decade⁹. The FCC, aware that the policies aforementioned were ineffective decided to start promoting its tax certificate program to encourage minority ownership.

One of the more successful programs embarked upon by the FCC, the tax certificate program, directly influenced the cash shortage problem that minority entrepreneurs faced. The program allowed minorities to save on taxes when selling their companies for profit because it deferred the payment to the IRS of taxes that would otherwise be due on all profit. It also encouraged non minorities to sell to minorities because the program allowed them to save taxes on all profit made when selling to a minority owned entity¹⁰. As of 1995, 42% of minority owned broadcast stations used the tax certificate program at one point or the other¹¹. In early 1995, congress repealed the powers given to the FCC to appropriate funds thereby invalidating the tax certificate program. This lack of power on the part of the commission is troublesome because as noted by Commissioner Barrett in his 1997 report "financing was the single greatest obstacle to the entry of minorities in the telecommunications industry."¹²

Before commissioner Kennard left his seat as head of the commission he made a few recommendations to the commission to ameliorate the state of minority ownership as it concerned the availability of funds. Most important of his recommendations is his desire to influence congress to reinstate the tax certificate program. "More than any policy, the

⁹ By the Commission: Commissioner Barrett issuing a statement, April 17, 1997.

¹⁰ Other Federal Policies: The Federal Communications Commission, Clinton's White House.

¹¹ Federal Communications Commission, "Summary of FCC Tax Certificate Data," at 4 (Data as of 2/28/95).

¹² By the Commission: Commissioner Barrett issuing a statement, April 17, 1997.

minority tax certificate is recognized as having had the greatest in lowering the barriers for minority broadcasters.¹³”

In 1996 the FCC held a conference to hear the views held on the controversial minority ownership rules. James Winston the executive director of the National Association of Black Journalist criticized the business sector of partaking in “no urban dictates.” These dictates prevented advertising agencies from buying air time on urban stations. This directly led to a decline in the price of air time on minority owned stations reducing profit margin. In the “When Being Number One is Not Enough” study of 1999, it was estimated that minority discounts and no urban dictates caused a 63% decrease in revenues by urban stations. Even luxury car maker, BMW has been reported as taking part in such dictates. They refused to place ads on urban stations in the New York City Area even after they were confronted with evidence that showed that blacks accounted for 46% of BMWs that were either owned or leased¹⁴. This loss in revenue obviously decreases the competitiveness of these stations and their ability to perform as well as their counterparts.

The National Telecommunications and Information Administration during the late 1990’s conducted research to determine the state of minority ownership in America. The study concluded that there have been negligible increases in the number of stations owned by minorities. The few new station owned by minorities were primarily acquired by minorities who already held stations and not new people entering the marketplace. Higher levels of competition faced by minorities due to the Telecommunications Act of 1996, the little leverage that minorities had to begin with because they mainly owned AM stations in small

¹³ Statement of FCC Chairman William Kennard on Minority Broadcast Ownership

¹⁴ When being Number One is not Enough, http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/adstudy01.pdf

markets, and importantly, the lack of funds available to minorities all attributed to the minor increase in minority held media entities.

Robert Johnson, the former owner of BET the only black owned national cable channel at the time was quoted as saying that “blacks must look to white money in order to scale the U.S. corporate heights, you can’t do it as a black-owned business; there isn’t that much capital, you have to do it as a white-owned business with black management.”¹⁵ The FCC tax certificate problem could have helped to solve the problem but instead minorities have had to rely on borrowing money from unwilling banks and forming coops with other black entrepreneurs to raise capital to purchase broadcast facilities.

Sadly the FCC has not been able to confront the cash flow issue as it concerns minorities. As a matter of fact the FCC has not been able to cause much change in the state of minority ownership. Most of the policies adapted in the last 50 years are either ineffective or have been repealed. The only one of the policies still in effect that the FCC had decided to actively increase diversity in the media is the training programs that were adopted in 1978, which have not been very effective in increasing minority ownership¹⁶.

Not surprisingly, the rate of minority acquisition of media entities is consistently shrinking not only as a result of the failure of FCC policy but because of increased competition and dwindling resources. The few companies that still do exist are being swallowed up by huge media conglomerates, BET and Telemundo have recently been bought by Viacom/CBS and GE/NBC respectively¹⁷.

¹⁵ Dana Rawles, December 12, 2002, “Minorities and the Media: “Little Ownership and Even Less Control”

¹⁶ Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities. Appendix A: A Summary of the FCC’s minority Preferences. Joel Waldfogel.

¹⁷ Minority Ownership of Major Media Going Extinct by Jeffrey Chester, www.alternet.com December 16, 2002

So far we have seen that the measures taken by the FCC as far as minorities are concerned have not had as severe an impact on the existing state of ownership as the commission would have then liked. It should therefore follow that there would be more initiatives to protect minority opinion and ensure its development. The reverse has become true as seen in the more recent rules adopted by the commission on ownership.

In more recent times, it seems that, the FCC has made little effort to respond to the needs of the minority entrepreneur. The commission appears to have forgotten the high regard in which it held diversity of opinion in exchange for appeasing huge, white owned media conglomerates. In the FCC's zeal to promote capitalism they have overlooked the fundamental free market lesson that taught that capitalism is only beneficial where private goods are concerned, it does a very poor job of allocating public goods; goods like television and radio airwaves.

In June of 2003 the FCC led by Mike Powell, an African American, voted to relax the ownership policies long held the commission. Some of the more important aspects of the legislature include the increase in market share that a single company can have; 45% up from 35% and the approval of a plan that allows one media entity to own both a broadcast facility and a major newspaper in a single market. This policy will no doubt influence the state of minority holdings of media entities in America.

Minorities are still struggling to have their voices heard in a country where government policy and FCC regulation seem to be discouraging just that. The future of media diversity lies in the ability of diverse groups of people to finance entrepreneurial schemes and compete against established media houses. The new ownership policies will do nothing to help the plight of broadcasters, nor will the mostly conservative FCC. So

minorities are left with few choices, borrow money at high interest rates, if they are lucky enough to be loaned money, or form coops with other minority businesspersons. The fact of the matter is that the public should not have to rely on the success of these ventures to determine the diversity of opinion in the media.

It must be reminded that the prevalence of diversity in the media is not only to the benefit of minorities but to the greater public. It is time that the FCC and congress realized the impact that minorities can and should have on mainstream media. All measures that promote minority ownership but do not unduly infringe on the majority's right to access should be taken to ensure that all opinions are heard to further the cause of not only minority groups but all groups. For far too long, minorities have faced barriers to working in and owning media. The nation benefits when the courts and the FCC ensure that the media better reflects the diverse market it serves.

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