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The Federal Communication Commission's Approach to Minority Ownership of Broadcast Facilities

James W. Henderson
Minorities\(^1\) are underrepresented in many of the major power centers of this society,\(^2\) including the electronic media. This is especially true in policy and decision-making positions.\(^3\) As the Federal Communications Commission (FCC) recounts:

This situation is detrimental not only to the minority audience but to all of the viewing and listening

\* I dedicate this essay to the memory of my grandmother, Luevenia Lassiter, who taught me how important it is for minorities to gain access to the electronic media during "the media age."

1 For the purposes of this article, minorities include those of Black, Hispanic Surname, American Eskimo, Aleut, American Indian and Asiatic American extraction. See Federal Communications Commission, Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 [hereinafter cited as F.C.C.'s Minority Policy Statement].

2 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter cited as Kerner Report].

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.⁴

Psychologists have found that access to the media and the portrayal of a disenfranchised group in positive roles in television programs can serve as a means for building the self esteem of individual members of that group.⁵ If the television media is "a crooked mirror through which white America views itself,"⁶ then it is not surprising that minority underrepresentation in television programming fosters a distorted and diminished sense of life's options for minority persons. Indeed, one researcher concluded that because "casting in the world of television dramas reflects status, income and power . . . underrepresentation leads to a restricted scope of action, diminished life chances and underevaluation ranging from relative neglect to symbolic annihilation."⁷

Such a conclusion is hauntingly reminiscent of W.E.B. DuBois' concern with the Negro's "double consciousness" in the early part of the twentieth century:

It is a peculiar sensation, this double consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels this twoness: an

⁴ F.C.C. Minority Policy Statement, supra note 1, at 980 & 981.
In a certain sense, the electronic media in the eighties not only reflects this "double consciousness", but it also perpetuates it. Since the sixties many broadcast licensees have made a concerted effort to include more minorities on prime time and weekend daytime network television dramas. However, such gains of Blacks, Hispanics and Orientals through the mid-seventies were not sustained into the late seventies.

The FCC is keenly aware of this problem. Its Minority Ownership Task Force Report recounted:

Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than one percent of the 8,500 commercial radio and television stations currently operating in this country. Acute underrepresentation of minorities among the owners of broadcast properties is troublesome in that it is the licensee who is ultimately responsible for identifying and serving the needs and interest of his audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities.

In response to the Minority Ownership Task Force Report, the FCC has said:

Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

8 W.E.B. DU BOIS, THE SOULS OF BLACK FOLKS (1903).
10 Gerber & Signorielli, supra note 7.
The FCC has taken several steps toward ameliorating this situation. They can be classified as finance devices and media access opportunities. This paper will review and assess both. The thesis is that there are two major obstacles to minority ownership of broadcast properties: unavailability of necessary finances and scarcity of the electromagnetic spectrum.¹³ The finance devices address the first obstacle by

¹³ The Electromagnetic Spectrum:

The value of the spectrum lies primarily in its use for conveying a wide variety of information at varying speeds over varying distances: in other words, for communications. All electromagnetic radiation is a form of radiant energy, similar in many respects to heat, light, or X-radiation. All of these types of radiation are considered by physicists to be waves resulting from the periodic oscillations of charged subatomic particles. All radiation has a measurable frequency, or rate of oscillation, which is measured in cycles per second, or hertz. One thousand cycles per second equals one kilocycle per second (1 KHz); 1,000 kilocycles per second equals one Megacycle per second (1 MHz); and 1,000 Megacycles per second equals one Gigacycle per second (1 GHz). The frequencies of electromagnetic radiation that comprise the radio spectrum span a wide range, from 10 KHz to 3,000,000,000,000 cycles per second (3,000 GHz), all of which are nearly incomprehensibly rapid. Present technology allows use of the spectrum only to 40 GHz.

The radio spectrum resource itself has three dimensions: space, time and frequency. Two spectrum users can transmit on the same frequency at the same time if they are sufficiently separate physically; the physical separation necessary will depend on the power at which each signal is transmitted. They then occupy different parts of the spectrum in the spatial sense. Similarly, the spectrum can be divided in terms of frequency, dependent on the construction of the transmitting and receiving equipment; or in a temporal sense, dependent largely on the hours of use.

The spectrum is divided into numbered bands, extending from Very Low Frequencies (VLF) to Very, Ultra, Super and Extremely High Frequencies (EHF) and beyond. The lower frequencies of the radio spectrum are used for "point-to-point" communications and for navigational aids. AM radio is located in the range between 300 and 3,000 KHz, known as the Medium Frequency band (MF). FM radio and VHF television (channels 2-13) are in the Very High Frequency band (VHF), from 30 to 300 MHz. The Ultra High Frequency band (UHF), from 300 to 3,000 MHz, is the location of UHF television (channels 14-83). Still higher frequencies are used for microwave relays and communications satellites.

M.A. Franklin, MASS MEDIA LAW: CASES AND MATERIALS 536 (1977) [herein cited as MASS MEDIA LAW].
creating financial incentives to would-be sellers to minority entrepreneurs and relaxing finance requirements for would-be minority broadcast licensees. The media access opportunities address the scarcity of the spectrum resource by (a) proposing several radio and television rules which would increase the number of AM radio stations and VHF and UHF television stations and, (b) advocating a scheme which would allow minorities to participate in part-time operation of existing broadcast stations through a time-brokerage arrangement (also called "timesharing") with non-minority licensees.

All of the proposals have a superficial appeal. In particular, the report and order pertaining to clear channel broadcasting on the AM radio band and the low-power television inquiry offers opportunities for minorities to gain greater access to the electronic media. Although the finance devices create viable financial incentives for potential minority broadcast licensees, such incentives may not go far enough in view of America's current economic crisis and the inflationary nature of the broadcast property market. Thus, it may be necessary to buttress existing financial incentives.

15 Report and Order: Clear Channel Broadcasting in the AM Broadcast Band, FCC 80-317, Docket No. 20642 [hereinafter cited as Clear Channel AM Order].
16 Low Power television is a new service that would allow low power stations to operate on any VHF or UHF channel on a secondary non-interference basis to full-service stations. The service would consist of existing low power translator stations as well as new stations. The translators or new stations would receive a television signal on one channel, amplify it, and then retransmit that signal on another channel. The coverage area of a low power station is expected to be less than a 15 mile radius. See generally 45 Fed. Reg. 69,178 (1980) [hereinafter cited as Low Power Inquiry].
A. The Finance Devices

The finance devices pertaining to minority ownership of broadcast facilities include "tax certificates", "distress sales", and "reduction in financial qualification requirements for radio and television applicants". In addition, "Rule Waivers" is a final order which is not financial in nature, but involves the FCC waiving certain of its rules.18

The "tax certificates"19 and "distress sales" policies were set forth in the FCC's Statement of Policy on Minority Ownership of Broadcasting Facilities.20

The FCC summarized the "tax certificate" policy:

In conjunction with our customary examination of assignment and transfer applications, we intend to examine such applications where a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased. In such circumstances, we will make use of our authority to grant tax certificates to the assignors or transferors where we find it appropriate to advance our policy of increasing minority ownership.21

18 For example, regulations like those which impose restrictions on the transfer or assignment of a broadcast license of the licensee who has held less than three years might be relaxed if the station were to be sold to a minority enterprise. See 47 C.F.R. § 73.3597 (1980).

19 Under 26 U.S.C. Section 1071 (Internal Revenue Code), the Commission can permit sellers of broadcast properties to defer capital gains taxation on a sale whenever it is deemed "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations..." Originally tax certification was used to remove the hardship of involuntary transfer as a result of divestiture imposed by the Commission's multiple ownership rules. Now, however, tax certificates are routinely approved in voluntary sales as an incentive to licensees to divest themselves of communications properties grandfathered under the multiple ownership rules. See F.C.C. Policy Statement: Issuance of Tax Certificate, 19 P. & F. RADIO REG. 2d 1831 (1970).

20 See F.C.C. Minority Policy Statement, supra note 1 at 979-985.

21 Id. at 983.
Prior to this ruling, the FCC contemplated issuing tax certificates where minority ownership was in excess of 50% or was a controlling interest. As a consequence of this ruling, it seems that the FCC will no longer adhere to a rigid formula in determining whether an assignee or a transferee is a minority entrepreneur.  

The FCC summarized the "distress sale" policy:

We will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

Thus, permission to sell at a "distress sale" price is available only if 1) minorities will participate significantly in the new ownership of the station and 2) the sale occurs before the hearing actually begins. Because FCC policy generally prohibits the sale of a broadcast station after the station's license has been set for a hearing, the Commission believed its action would stimulate the sale of broadcast properties to minorities. "The Commission thought that a licensee facing a potentially costly and time-consuming hearing might choose instead to keep losses to a minimum and sell his or her station to a minority enterprise."  

22 The FCC has stated:

We currently contemplate issuing a certificate where minority ownership is in excess of 50% or controlling. Whether certificates would be granted in other cases will depend on whether minority involvement is significant enough to justify the certificate in light of the purpose of the policy announced herein. Id. at 983 n.20.

23 See F.C.C. Minority Policy Statement, supra note 1, at 985.

The final finance device is the reduction in financial qualification requirements for radio and television station applicants. Pursuant to the FCC regulations, an applicant for a broadcast station must demonstrate that he or she has adequate capital to operate the station for a certain time. Until recently, this so-called "working capital requirement" was one year. In August, 1978 the FCC reduced the working capital requirement for radio applicants to three months. In May, 1979, the Commission reduced the working capital requirement for television stations to three months.

In relaxing the working capital requirement, the FCC believed that minority enterprises would find it substantially easier to apply for and obtain radio broadcast licenses.

In 1979, four black entrepreneurs acquired television stations. The following account appeared in "Black Enterprise" magazine:

As a result of the new FCC procedures, increased capital sources available to minority entrepreneurs, and activism on the part of black businessmen, 1979 has become what amounts to a boom for blacks in TV-station ownership. Three VHF stations were purchased and a license obtained to construct a new UHF station. A recent agreement between Cox Broadcasting and civil rights groups in Atlanta should result in the transfer of two more UHF stations to black control.

In order to provide incentive for broadcasters opting for this approach, we would expect that the distress price would be somewhat greater than the value of the unlicensed equipment, which could be realized even in the event of revocation. See "Second Thursday Corporation," 22 FCC 2d 515 (1970), recon. granted, 25 F.C.C. 2d 112 (1970); Northeastern Broadcasting Corporation (WLTH), 75 F.C.C. 2d 66 (1977).

27 See CCG Report, supra note 24, at 9.
Thus, it appears that in 1979 at least four black entrepreneurs took advantage of FCC rules pertaining to "tax certificates", "distress sales" and "finance reduction." FCC statistics indicate that since 1978, 48 entrepreneurs have acquired broadcast facilities.

However, "tax certificates", "distress sales", and "finance reduction" provide only as many opportunities as there are broadcasters who are willing to transfer or assign their broadcast facilities to minorities.

A comparison of the small number of minority broadcasters with the total number of radio and television stations in this country (approximately 10,000) suggests how limited in effect these devices are. It is, therefore, essential that media access opportunities be increased if minorities are to own significant numbers of broadcast facilities. The FCC is aware that finance devices alone will not ameliorate the dearth of minority ownership in the broadcast industry. The proposals and policies, discussed below, address the issue of increasing access opportunities.

B. Media Access Opportunities

The media access proposals and policies can be subdivided into three categories: the time-sharing or time brokerage policy; the radio proposals; and the television proposals. Of all of the proposals the final report and order pertaining to clear channel broadcasting on the AM band (the clear channel order) and the low power television inquiry are the most significant. The clear channel order is significant not only because it will result in the authorization of an

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29 F.C.C. statistics on minority ownership of broadcast properties were received during a telephone interview with Barbara Moran, Deputy Chief of FCC's Minority Enterprise Division (February 29, 1981) [hereinafter cited as Moran Telephone Conversation].

30 See CCG Report, supra note 24, at 9.
additional 125 unlimited time AM operators but also because preference will be given to applicants with more than 50% minority ownership interest, especially in cities where the need is greatest because minority populations are most numerous. The low power inquiry is significant because it could provide greater minority access to the television media in what Marshall McLuhan calls "the media age."31

1. The Time Brokerage Policy

The FCC introduced the "time-sharing" proposal in November of 1978 in response to a request from the National Telecommunications and Information Administration. 32 The plan contemplates agreements between minority individuals and broadcast licensees whereby the minorities operate the television or radio station on a part-time basis. The FCC summarized the advantages of the plan:

Minority time-sharing could lead to:
1. more diverse programming
2. more broadcast employment opportunities for minorities; and
3. more managerial and operational experience in broadcasting for minority enterprises.

Additionally, part-time operation of existing broadcast stations by minorities would probably not require the major capital expenditures that so frequently are roadblocks to outright minority acquisition of broadcast properties.33

In October, 1980, the proposal became a final order as time-sharing. The Commission stated that it would "impose no screening process or intrude into negotiations of brokerage

31 See MARSHALL MC LuhAN, UNDERSTANDING MEDIA (1964).

32 F.C.C. Notice of Inquiry BC Docket No. 78-355. The National Telecommunications and Information Administration is a division of the U.S. Commerce Department.

33 See CCG Report, supra note 24, at 9.
arrangements as long as licensees and minority brokers comply with FCC rules and regulations. To date, no licensee or minority brokers have entered into time-sharing arrangements. 34

2. The Radio Proposals

The FCC proposed that the International Telecommunications Union (ITU) 35 seek to amend pertinent international radio regulations to include an additional spectrum allocation for AM radio broadcasting. If such a proposal were adopted by ITU and implemented in the United States through rulemaking, an expansion of the AM broadcast band would result in many new AM broadcast stations, more diverse programming and more opportunities for minority enterprises. The frequencies or channels on which broadcasting (and other) stations may transmit are governed in large measure by the Radio Regulations of the ITU, an arm of the United Nations. 36 In 1979, the ITU considered changes in the International Table of Frequency Allocations. It did not, however, make any decision in this regard during that or the 1980 meeting.

The FCC has also changed its rules to permit additional AM radio stations to transmit on the same frequencies as Class 1-A clear channel AM stations. 37 A Class 1-A clear channel station is one which is authorized to transmit with a power of 50,000 watts and which is assigned a frequency on which there are few, if any, other AM stations operating in the United States. Because of its power and because it has virtually

34 See Moran Telephone Interview, supra note 29.
35 The International Telecommunications Union is an arm of the United Nations. The frequencies or channels on which AM broadcasting stations may transmit are governed in large measure by the Radio Regulations of the International Telecommunications Union.
36 See CCG Report, supra note 24, at 9.
37 BC Docket No. 20-642.
exclusive use of the frequency, a clear channel station may be
heard at night over long distances. This change will result

Briefly, the AM broadcast band is made up of 107 channels, spaced, as
they now are, 10 kHz apart between 540 kHz and 1600 kHz. AM signals
retain a field of strength great enough to cause objectionable inter­
ference to co-channel stations at much greater distances from the trans­
mmitter than the range within which they retain enough field strength to
render a usable service.

An understanding of the basis for the established scheme of clear
channel allocations also requires recognition of certain AM propagational
effects. "Primary" or "groundwave" service is provided by AM signals
propogated horizontally. The distances to which groundwave signals render
usable service, and the greater distances within which they remain strong
enough to interfere with service from co-channel stations depend on several
highly variable factors. These include the frequency, power, directionali­
zation and other characteristics of the transmitting facilities, and
character of the soil ("soil conductivities") over which the groundwave
signal passes. The service and interference ranges of groundwave signals
are substantially constant day and night. There is therefore no signifi­
cant difference, day and night, in the distance from the transmitter at
which the groundwave signal's field strength will have a given service of
interference potential. At night, however, a phenomenon called "skywave
transmission" very substantially increases the distances at which AM
signals can render a usable service, and enormously increases the dis­
tances at which they can create destructive interference to the service of
other stations operating on the same channel. The signals which radiate
upward and outward have no consequential effect at the earth's surface
during most daytime hours. At night, however (and to a lesser extent
during certain transitional periods before sunset and after sunrise), that
part of an AM stations' radiation reflects off an atmospheric layer called
the ionosphere. This enables such "skywave" signals to return to the
surface many hundreds and, under some occasional conditions, thousands of
miles away, thereby enormously extending the nighttime service and inter­
ference ranges of the station.

This means, that in order to keep service by a station to a particu­
lar area free from destructive interference, the locations from which
co-channel stations are permitted to radiate signals toward the protected
area at night must be much further away at night than would be required
for a daytime operation. Also co-channel radiations toward the protected
area must be reduced at night through decreased transmitter power and/or
directionalization of the co-channel radiation away from the protected
area. In some circumstances the co-channel operation must be discontinued
altogether at night.

Because of the foregoing inherent characteristics of AM signal propa­
gation, the larger the numbers of co-channel stations, the smaller the
areas in which they can render service free from mutually destructive
interference. However, since the more sparsely populated rural areas
generally depend for service on more distant stations, realization of the
goal of some service to all requires two conditions which -- especially at
night -- inescapably limit the number of facilities of stations permitted to share the use of a given channel. First, a wide area can be served by a station only if it operates with enough power to deliver a signal of usable field strength throughout the area to be served. Also, the numbers, locations, and facilities of co-channel stations must be so limited as to keep the desired service area free from destructive co-channel interference. These two requirements for a wide area service create a head-on conflict among the basic allocations goals which can be served through the use of any AM channel. Multiple services and local outlets call for maximizing the numbers of stations assigned to a channel at least up to some point of diminishing returns where mutual interference, especially at night, reduces residual interference-free areas to the point where the co-channel stations could not adequately serve their local communities. On the other hand, wide-area service can be achieved only by limiting the extent to which a channel is shared. That is, wide area service is made possible, and the extent of it is enhanced, by limitations on the numbers of co-channel stations and by restricting their radiation toward the stations providing wide area service.

Recognition that the conditions which create and enhance the possibilities for wide-area service on AM channels correspondingly diminish the potential for assigning co-channel stations led early to the distribution of AM channels among several "classes." Each such class of channel, and the stations assigned to do it, have different service objectives. The achievement of the several differing 307(b) objectives has thus been fostered by the adoption of differing conditions for the operation of stations on the several classes of AM channels in conformance with internationally agreed allocations of spectrum use. We next note the essential purposes served by various classes of AM channels and stations.

Class I stations are assigned to 47 channels designated for wide area service, upon which, under international agreement, the United States has priority use. The channels are further divided up as follows:

Class I-A: 25 channels upon which there is a single dominant station, operating at a power of 50 kW, day and night, and generally omnidirectional. Dominant stations on these channels receive protection to both their groundwave and skywave service areas.

Class I-B: 22 Channels typically occupied by more than one dominant station directionalized to protect each other. Like Class I-A stations, Class I-B stations receive groundwave and some skywave service protection.

Class II stations are assigned to the foregoing Class I-A and I-B channels as well as the additional Class I channels on which dominant stations are assigned only in other countries. Class II stations provide substantial interference protection to Class I-A and I-B stations, but receive no protection from the interfering signals of those stations.

Class III stations are assigned to 41 regional channels intended to serve major population centers and their surrounding areas. Their power does not exceed 5 kW. Class IV stations are assigned to 6 channels for localized service. Their power may not exceed 1 kW day and 250 watts at night.

See Clear Channel AM Order, supra note 15 at 4-6.
in authorization of an additional 125 unlimited time AM opera-
tions and increased opportunities for minority broadcast 
operation and ownership. Thus far, fifty applications have 
been received, but no clear channel licenses have been granted.

Pursuant to the "AM spacing scheme", the AM band would be 
restructured so that the $10^{\text{kHz}}$ between existing stations would 
be reduced to $9^{\text{kHz}}$. By reducing the minimum separation be-
 tween stations, additional AM stations can be squeezed in 
whenever practical. Such matters relating to the AM band 
are under the jurisdiction of the Western Hemisphere Admini-
strative Conference on Medium Frequency Broadcasting. When 
the member nations, including the United States, met in Novem-
ber, 1980, the "AM spacing scheme" was discussed but it was 
tabled pending further investigation of the possible interfer-
ence which it could cause. It is not clear at this point how 
many additional AM stations would be created if the plan were 
approved. However, the FCC supports the plan.

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39 See Moran Telephone Interview, supra note 29. According to Ms. Moran, the following criteria will weigh heavily in favor of Class 1-A clear channel applicants:
1. minority ownership or substantial minority involvement
2. public broadcasting format
3. providing secondary night service


41 The present U.S. spacing between AM radio channels, which also prevails in much of the Western Hemisphere, is 10 kHz, while 9 kHz spacing is in effect in the rest of the world. The narrower separation would make room for the 12 additional channels in the AM band of frequencies.

The United States cannot unilaterally adopt 9 kHz spacing because of the potential for interference that would result if neighboring countries used different channel spacings. It is obliged to follow the prevailing pattern.

The U.S. proposal to adopt 9 kHz spacing was given preliminary consi-
deration in March at the first session of the Region 2 (Western Hemisphere) Administrative Conference on Medium Frequency (AM) Broadcasting, a forum of the International Telecommunication Union. The proposal is expected to receive final action at the second session of the regional conference starting in November 1981. If adopted, it is expected to take several years to put the plan into effect.

Id. at 2.

42 See CCG Report supra note 24 at 9.
3. The Television Proposals

Pursuant to the "VHF drop-in" proposal, an additional 139 full-service VHF stations would be created by dropping in a lower power VHF station between the ranges of existing VHF stations. However, according to one engineering consultant:

Drop-ins create a potential threat to established broadcasters. The FCC is lying when it says that drop-ins won't cause substantial interference to existing stations. Such new stations will cause extensive interference to the coverage contours of the existing stations.

VHF drop-ins are based on the "equivalent protection theory": minimum mileage separation can be traded off for reduced power. Many engineering consultants agree that the equivalent protection theory is valid in most cases; however, many concede that drop-ins would cause additional interference to the signal of existing stations. Thus, one alternative to the FCC drop-in proposal is something similar to the "AM spacing scheme": reduce mileage-separation requirements and squeeze in the stations where possible. It is possible that this proposal will be tabled indefinitely once President Reagan appoints a new FCC Chairman.

The final and most significant proposal is the comprehensive inquiry into Low Power Television Service. A broad inquiry into low power was initiated by the FCC in August, 1978 because of "the possibility that the current translator service could be viewed as the evolutionary basis for a larger

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43 "Full service" television stations are those with complete facilities and staff. They are licensed under Part 73 of F.C.C. rules.
44 BC Docket No. 80-499.
45 See Howard Head (A.D. Ring and Associates) quoted in BROADCASTING, September 29, 1980, at 64.
46 Id.
47 See Low Power Inquiry, supra note 16.
and more flexible low power service. The action was based, in part, upon evidence of a large unsatisfied demand for television broadcast service in both rural and urban areas. An FCC task force was created to develop the public record, to sponsor research and to perform its own studies in order for the FCC to proceed to the state of proposed rules. In September 1980, the FCC announced the "Interim Processing Procedures for FCC TV Translator Applications Seeking Low-Power Features". The following was reported in the Federal Register:

This new class of broadcast stations called the Low-Power Television Service would be allowed to originate an unlimited amount of programming. The service is envisioned as operating on a secondary, non-interference basis to regular, full service TV broadcast operations. It would include existing TV translators, which are secondary low power stations that receive a television signal on one channel, amplify it, and then retransmit that signal on another channel.

In the Notice of Proposed Rulemaking, the FCC further elaborated on the "secondary status" of the low power television service and how full service stations would be given primary consideration over low power stations:

Secondary status means that a translator or low power station creating harmful interference to a full service station must cease operation if it is unable to change its channel or take other steps to correct the interference. Translators and low power stations give way to a full service station proposing a mutually exclusive use of a frequency.

Secondary status permits a more flexible approach that enables the low power station broadcasters to select the appropriate mix of technology that accords with local needs, up to the definitional limits of the service itself: namely, maximum transmitter

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48 Id. at 69178.
powers of 100 watts (VHF) or of 1,000 watts (UHF).

Because of the risks inherent in such secondary status, the FCC is proposing that low power operators be given broad latitude to design and engineer a system adapted to local needs. The FCC is also proposing flexible standards for programming, financial support, and ownership. 51

For example, current translator rules limit program origination to emergency warnings and to 30-second fund-raising appeals. 52 The FCC proposes to authorize unlimited originations as an inherent feature of proposed low power television service. A number of technical developments have converged so that equipment for originations can now be made to function reliably, without creating new problems of objectionable interference. 53 These developments include:

1) development and rapid refinement during the 1970's of low cost portable videotape players

2) advent of integrated circuits which can generate full NTSC black and white and color synchronization signals (instead of non-interfaced sync as used in low-cost television cameras of the past), as well as generating television carriers and graphics and lettering on the screen of a standard receiver, sometimes along with NTSC color and 4.5 MH2 sound. Such integrated circuits greatly decrease the size and cost of high quality (and for that matter, low quality)

51. Id. at 69179.
53. The spectrum is subject to the phenomenon of interference. One radio signal interferes with another to the extent that both have the same dimensions. That is, two signals of the same frequency that occupy the same physical space at the same time will interfere with each other (co-channel interference). Signals on adjacent channels may also interfere with each other. Interference usually obscures or destroys any information that either signal is carrying. The degree to which two signals occupy the same physical space depends on the intensity of the radiated power at a given point, which in turn depends on the construction of the transmitting equipment antenna. See MASS MEDIA LAW, supra note 13, at 537.
television equipment, requiring less adjustment and being less likely to generate an out-of-tolerance condition, allowing users to concentrate more on subject matter and less on technical details.

3) Satellite technology has opened new possibilities for reliable, low-cost program interconnection services. For example, Spanish International Network is using satellite relays for delivery of its network feed from San Antonio to experimental translator stations in Washington, DC and Denver.54

Translators are forbidden from deliberately altering a rebroadcast signal so as to make it inaccessible to a conventional home receiver unless the receiver includes a decoding device which unscrambles the signal.55 Such scrambled programming is used to collect subscription fees. Because this ban retards the growth of television services in many sparsely populated areas,56 the FCC proposed that subscription television be an inherent option in low-power television. The FCC explains its change in position:

The public interest would not be served by artificial limitations upon the ability of advertiser-supported or tax-supported service to compete with pay television service; mixture of advertiser-supported and pay TV service is the pattern of distribution most likely to maximize consumer welfare from television.57

Unlike full service subscription television stations, low power subscription stations will not be required to provide free programming to consumers because such an imposition could curtail provision of the service in certain communities.58

54 See supra note 16, at 69181.
55 See Report and Order in Docket No. 21502, adopted September 25, 1979, F.C.C. 79-535.
56 See Low Power Inquiry, supra note 16, at 69183.
57 Id.
58 Id.
The FCC does not believe that existing provisions regarding copyright and retransmission consent should be amended for low power television. The Commission explains:

Such existing provisions regarding copyright and retransmission consent, are adequate to establish an initial assignment of program rights so that low power stations will be free to enter the marketplace for programs and to privately negotiate appropriate arrangements for the program services they may offer.

Will the Fairness Doctrine, political broadcasting

Copyright liability for low power stations is governed by two statutory provisions. The first is contained in the General Revision of Copyright Law, Pub. L 94-553, 17 U.S.C. 101 et seq. (1976) redefining the rights of, and limitations upon copyright owners in the use of their works. Essentially, non-cable retransmissions, with the exception of those by governmental or non-profit entities, are subject to full copyright liability. Sec. 325(a) of the Communications Act permits the rebroadcast of programming only if the rebroadcasting station has obtained the consent of the originating station. Although rebroadcast consent needs to be sought, the Commission has held that it may not be withheld without justification.

It is axiomatic that one of the most vital questions of mass communication a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

13 F.C.C. 1246 (1949)
rules, and the ascertainment requirement apply to low power stations? The Commission's views are as follows:

**Fairness Doctrine**

It appears reasonable in most instances to permit stations in the low power services to achieve compliance with the Fairness Doctrine by showing that they had accepted and broadcast reasonable amount of

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62 Section 315 of the 1934 Communications Act as amended states:

Sec. 315(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for the office in the use of such broadcasting station. Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any -

1. bona fide newscast,
2. bona fide news interview,
3. bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
4. on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.


63 Description of the ascertainment process at WGBH-TV, Boston, Massachusetts:

The FCC requires that all broadcasters ascertain the need of the local community by conducting personal interviews of community leaders and by a telephone survey of the general public. It is expected that the findings will influence programming decisions. At WGBH these interviews are conducted continually throughout the year; managers, executive producers, producers, and researchers are responsible for these interviews.

responsive issue programming submitted to the station in a form or format compatible with the station's originating equipment.

Also, a reasonable amount of time should be made available for the presentation of contrasting views also submitted in a form compatible with the station's originating equipment.64

Political Broadcasting

Low power and translator stations would be required to provide reasonable access to, or to permit purchase of reasonable amounts of time by legally qualified candidates for Federal elective office. However, we do not propose to require the stations to provide production facilities, and see its duties as ending with the acceptance of political material furnished in a format compatible with the station's originating equipment.65

Ascertainment

We do not believe that the Commission should require formal ascertainment in the low power television service. Ascertainment is not required of translator stations. The low power station will have a small coverage area and typically would select a directional antenna to cover a specific pocket of local population, such as a valley floor or part of a city. The likelihood of familiarity with the service area by the licensee is much greater than is the case with full service stations, whose signals span a wider distance. Beyond this, formal requirements could impose too great a burden for these stations to carry.66

C. Critique of Finance Devices and Media Access Proposals

It was indicated at an earlier point in this article that 48 entrepreneurs have acquired radio and television properties since 1978.67 There are approximately 10,000 commercial radio

64 See Low Power Inquiry, supra note 16, at 69184.
65 Id. at 69185.
66 Id.
67 See Moran Telephone Interview, supra note 29.
and television stations operating in this country. Thus, although minorities comprise approximately twenty percent of the population, they control fewer than one percent of these stations, even with the increase of forty-eight minority broadcasters since 1978. Even so, the recent increase in the number of minority broadcasters clearly indicates that the final order pertaining to "distress sales", "tax certificates", and "finance reduction requirements" are steps in the right direction.

With respect to the proposals pertaining to the "expansion of the AM broadcast band", "AM Spacing", and "VHF drop-ins", it does not appear that final decisions will be made on these matters for some time. Engineering consultants believe that VHF drop-ins will create more interference problems than the FCC is willing to admit. Many broadcasters are concerned that the other proposals could have an adverse competitive and economic impact on existing broadcast stations.

The FCC rule change to permit additional AM radio to transmit on the same frequencies as Class 1-A clear channel AM stations is a significant development as it would result in authorization of an additional 125 unlimited time AM operations. However, it is premature to assess its impact on minority ownership, to date, no clear channel licenses have been granted under the new ruling.

The "time-sharing" scheme has a certain superficial appeal as it could lead to more employment opportunities for minorities and more diverse programming without requiring the major capital expenditures that so frequently are roadblocks to minority ownership of broadcast properties. Although the FCC encourages the plan, it will not involve itself in the screening process nor intrude into negotiations of brokerage

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69 See, e.g., supra note 45 and generally Low Power Inquiry, supra note 16.
arrangements. Thus, the FCC policy encouraging time-sharing could conceivably end up as an empty gesture since it provides no built-in incentives or enforcement mechanisms.

This proposal could be a means of increasing minority input at stations with a low level of minority employment. The Commission's reluctance to fashion rigid guidelines or become more involved with the specifics of the arrangements may be motivated by the caution with which it deals with employment discrimination matters in general. The "time-sharing" proposal also raises the question of minority "tokenism" or window-dressing. Because the FCC encourages the plan without imposing any specific requirements, it is conceivable that certain time-sharing schemes will amount to nothing more than the appearance of minority involvement. This raises a difficult policy question: should minorities resist such "tokenism" even if through it some minorities are positioned for the future and also gain invaluable exposure and experience? The answer to the question should probably be determined on a case-by-case basis after asking the question in the context of a given station's equal employment opportunity history.

The low power television inquiry is the most significant of the proposals not only because of the FCC's rigorous and comprehensive consideration of the matter, but also because television has a greater impact than radio on modern American life. During the

70 Unless the alleged employment discrimination is an "egregious" case involving "substantial disparities," the FCC will not hear issues concerning employment discrimination. See Non-Discrimination in Employment Policies and Practices of Broadcasting Licensee, 60 F.C.C. 2d 226,229 (1975) and In Re Application of Sonderling Broadcast Corporation, 68 F.C.C. 2d 752,758 (1978).

71 See Window Dressing, supra note 3.

72 See Low Power Inquiry, supra note 16.

73 See, MARSHALL MC LUHAN, UNDERSTANDING MEDIA, supra note 31.
pendency of the rulemaking on low power television, the FCC is processing translator applications seeking low power features. Several conditions are being imposed upon prospective applicants. These conditions include but are not limited to the following:

All translator applications will be conditioned expressly upon the outcome of the rulemaking. In the condition, the Commission will reserve the right to modify or to terminate any such authorizations upon 60 days notice after the adoption of any final Report and Order in the Low Power proceeding. This restriction is in addition to secondary status, which requires all translators to relinquish their frequency when a full service television station elects to operate there. 74

In view of the "secondary status" condition in particular, one question raised by low power television is analogous to the one discussed regarding time-sharing: should minority involvement on a "secondary status" level be resisted even if through low power television some minorities will be positioned for the future and also gain invaluable exposure and experience? The answer must be stated in a conditional way: such "secondary status" is acceptable as a temporary situation provided, however, that low power television serves as a weaning process through which minorities will eventually gain access to full service stations.

Here, more than in the time-sharing scheme, the potential for tokenism is a concern of the first magnitude. Minorities could be given low power licenses, with all of the appearances of high status and decision-making powers that are inherent in the broadcast license structure, only to have that license revoked if interference problems cannot be corrected or a full service station elects to operate on the same frequency. 75 In such an instance it would seem that the exposure and experience would have been in vain.

74 See Interim Processing, supra note 49.
75 See, supra note 50.
A related question is whether the flexible standards for programming, financial support and ownership are adequate compensation for the "secondary status"? The answer is probably, "yes." However, potential minority applicants for low power stations should realize that none of the finance devices discussed earlier will be useful in operating a low power station. The "distress sales" and "tax certificate" final order would only be useful if one were acquiring a low power station through a transfer or assignment arrangement. The "reduction in finance requirements" final order is of little assistance to a broadcaster who is determined to run a competitive and successful broadcast operation. There are at least two reasons for this.

First, a potential licensee must design and engineer a system that is technically adaptable to local needs. This requires hiring a first-rate engineer and an attorney with communications experience so that the technical plan is "competitive" and submitted to the FCC in accordance with FCC procedures. Second, once a license is granted, the real costs are just beginning. Because of the potential litigation surrounding, inter alia, interference with other stations, the withholding of copyright and retransmission consent without justification, and other matters, it is essential that a low power station owner or operator have easy access to an attorney (or law firm) with an expertise in communications regulations and television production-related matters. Such

76 See supra note 16, at 69179.
77 "Competitive" in this context refers to a technical plan that is capable of competing with other applicants for the same channel.
78 See Low Power Inquiry, supra note 16 at 69175.
79 Id. at 69181-69194.
80 Broadcasters tend to be sued for anything, including but not limited to equal time, fairness doctrine and employment discrimination.
an attorney is essential if a licensee wants to be prepared to handle the contingencies that may arise. Such an attorney is also expensive when one has to take into consideration other daily operating costs, particularly program rights fees.

The competitive nature of the television industry alone requires that a broadcaster have a strong financial base. The need for such a base will be especially important in view of the potential competition between cable and low power broadcasters. The FCC has liberalized many of its cable rules because it realizes the benefits of competition. In fact, its proposed policy statement indicates that the FCC encourages competition between low power and cable broadcasters:

We now believe that protection of local broadcasters from cable competition was a self-defeating enterprise, and have changed our cable rules to reflect that. Even if it did help local broadcasters escape the impact of competition, this protection came at the price of denying the public the benefits of new services on the cable. In the same way, we have concluded that it is counterproductive to attempt to shield cable from the rigors of competition with low power broadcast. We believe that competition between low power television and cable television and others will encourage each to build upon its unique strengths. Cable is most efficient in delivering a large number of channels to areas of comparatively dense population, and in overcoming congestion of broadcast frequencies. Low power broadcast television will be particularly important in serving sparsely settled areas, in other locations where full service broadcast stations and cable are not in a position to increase program choices, and in some densely populated urban areas where the cost of laying cable is extremely high.81

The upshot is that the current finance devices set forth herein will be useful in gaining access to a broadcast property, but will not be useful in making that property competitive in the television industry. Therefore, a strong financial base for a low power broadcast facility is an absolute necessity.

81 See Low Power Inquiry, supra note 16, at 69182.
D. Conclusions

The FCC, under the leadership of Chairman Ferris, should be commended for its innovative and comprehensive approach to minority ownership of broadcast properties. It has attempted to address finance obstacles by promulgating the "distress sales" and "tax certificates" policies and by "reducing initial finance operating requirements." The "distress sales" and "tax certificates" policies have increased the numbers of minority broadcasters by 48 since 1978. Most of the new broadcasters have acquired radio properties.

The FCC has vigorously and courageously addressed the scarcity of the electromagnetic spectrum by utilizing new and developing technologies to explore the extent to which new radio frequencies and television channels could be created. The clear channel order and the low power inquiry are good examples of the utilization of new technologies. The AM spacing and the VHF drop-in proposals are more questionable uses of developing technologies.

Because it has taken advantage of technological developments in order to increase media access opportunities, the FCC is doing something which in a certain sense is more significant than the clear channel or low power proposals. It is encouraging the private sector to make technological breakthroughs. In the early days of radio and television there was a pervasive belief that the spectrum was exceedingly scarce.\(^82\) That assumption became a self-fulfilling prophecy; it created little incentive for the private sector to develop more efficient uses of the electromagnetic spectrum.

The clear channel order deserves individual attention not only because it is a final order but also because it includes a minority preference provision. The only cloud lurking over this order is the current legal challenge by clear channel

\(^{82}\) See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, (1943).
licensee WWL in New Orleans. Certain Washington lawyers, who are actively engaged in the communications field, believe that the courts will ultimately uphold this FCC final order.

No action has been taken on the "AM band expansion" and the "AM spacing" proposals. This is probably because political bodies such as ITU and the Western Administrative Conference on Medium Frequency Broadcasting tend to move cautiously when considering rule changes which could potentially have an adverse impact on existing broadcasters in the Western Hemisphere.

The adverse economic and competitive factors seem to be among the reasons the FCC has not been eager to finalize rules on the VHF drop-in proposal. The critics of this proposal, particularly the engineering consultant groups, may receive a sympathetic ear from the person President Reagan appoints as head of the FCC.

Low power television is potentially as revolutionary as cable television was in the 1960's. The assumption is that low power stations will create television access opportunities for blacks, women and other disenfranchised groups, thereby providing more First Amendment voices over the airways. The assumption may prove fallacious because the interim processing order issued by the FCC does not include any minority or women preference provision. Neither do the proposed rules for low power television. Thus far, minority applicants for the interim licenses are outnumbered by non-minority applicants by more than six to one. Powerful groups like Sears-Roebuck, Ted Turner's organization and CBS have filed bulk applications with the FCC; thus, low power television may miss its promised goals by a long shot.

83 Interview with Ed Cardona, Chief of F.C.C.'s Minority Enterprise Division, March 12, 1981.
84 Id.
85 Id.
Low power television also has an inherent defect: its secondary, noninterference status (i.e. low power stations creating a harmful interference with full service stations must cease operation if it is unable to change its channel or take other steps to correct the interference). When one couples this defect with the potential competition with cable broadcasters, especially in densely populated areas, low power television becomes much more risky than it initially appears.

If a minority low power operator is located in a market where there is competition from cable and this same low power operator lacks a strong financial base, it is safe to predict for this minority entrepreneur, low power will promise half a loaf. However, if a minority entrepreneur selects his market wisely and has a strong financial base, he should have no problem realizing the goals of gaining exposure, experience and positioning for the future in the broadcast industry. The selection of the proper mix of programs which satisfies the advertisers, taxpayers or subscribers will be the key to success. The assumption that minority broadcasters will produce and air more minority programs may prove fallacious if the major financial supporters desire non-minority programs.

This review of the FCC approach to minority ownership of broadcast facilities brings to mind certain recommendations. First, the final rules on low power should include the kind of "minority preference" language which appeared in the clear channel report and order. If nothing else, this would encourage those filing bulk applications to plan for significant minority involvement in the operation of some of their stations.

Second, the FCC should continue to explore the "AM band expansion", the "AM spacing" and the "VHF drop-in" proposals. Because of the potential interference problems created by such proposals, the non-interference language which appears in the low power television proposal ("...stations must cease operation if it is unable to change its channel or take other
steps to correct the interference") might be adopted to appease the critics. In other words, new radio and VHF drop-in stations creating harmful interferences with existing broadcast stations must cease if they are unable to correct the interferences.

Finally, the FCC might consider buttressing existing finance devices in order to allow new minority broadcasters to survive in the highly competitive broadcast industry. One way to do this is to give tax-exempt status to minority broadcasters who demonstrate that their station will enhance First Amendment goals. A tax-exempt status will allow such broadcasters to issue tax-exempt bonds and thereby lure more investors. Another proposal is to set up a special FCC loan fund, modelled after the World Bank's "structural loan program." Simply stated, a struggling minority broadcaster might be eligible for a loan from the special FCC fund if he is willing to reduce his account deficit to a level commensurate with the amount of external capital to which the broadcaster can expect to have access on a regular basis, without straining its debt servicing capacity. In order to generate monies for such a loan fund, broadcasters could be charged an additional amount for the license renewal fee. The pooling of these additional amounts will form the basis of the special fund. Either plan would require Congressional legislation as the FCC is not authorized to issue such rulings.

James W. Henderson