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Counsel - Box 018 - Folder 001

FCC Affirmative Action [1]

Files Received from Douglas Letter

FCC Affirmative Action

Untitled (3 files)

Team Limits

Ruby Ridge

Civil Text Review

Product Liability

Smaltz Letter

Counsel's Office - Elena Kagan

File Received from Douglas Letter

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FCC Affirmative Action

Untitled (3 files)

Team Limits

Ruby Ridge

Civil Test Rebuttal

Product Liability

Smaltz Letter

ENCLOSURES FILED OVERSIDE ATTACHMENTS

**8286**

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# FEDERAL COMMUNICATIONS COMMISSION Telefax Cover Sheet

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Date \_\_\_\_\_

### FROM:

Name: William E. Kennard  
 Bureau/O: OGC  
 Phone: (202) 418-1700  
 Fax Number: (202) 418-2822

### TO:

Name: Abner Mikva  
 Organization: White House  
 Office: 456-2632  
 Fax Number: 456-2883

### SPECIAL INSTRUCTIONS:

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This Cover Sheet is Page 1 of \_\_\_\_\_ Pages

*1706*

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

March 7, 1995

IN REPLY REFER TO:

VIA TELECOPIER

Abner M. Mikva  
Counsel to the President  
Executive Office of the President  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Judge Mikva:

Thank you again for your interest in the FCC's tax certificate program. Since 1978, the Commission has used the tax certificate program to increase minority ownership of broadcast and cable television facilities, with considerable success. As you know, the House voted last month to repeal the FCC's tax certificate program. The House's action is the first in what appears to be a coordinated Congressional inquiry into all federal programs involving race-based preferences. The Senate held a hearing on the House bill (H.R. 831) today, at which I testified on the importance and success of the tax certificate program.

I enclose a document outlining five principles that are useful in evaluating minority enterprise programs in the communications area. I thought you might find this information useful as the Administration begins to review federal affirmative action generally.

Please contact me (202/418-1700) if you have any thoughts or questions about the document. Thank you.

Sincerely,



William E. Kennard  
General Counsel

Enclosure

## **AFFIRMATIVE OPPORTUNITY FOR THE COMMUNICATIONS REVOLUTION**

By

William E. Kennard

General Counsel, Federal Communications Commission

The communications, information and entertainment industries are vitally important, not only because they represent one-sixth of our economy, but because, more than any other industries, they reflect who we are as a nation, both here and around the world.

**There should be Affirmative Opportunity for the Communications Revolution.** Here are five precepts – Affirmative Opportunity Principles – to promote affirmative opportunity for the Communications Revolution.

### **ONE: AFFIRMATIVE OPPORTUNITY FOR ALL AMERICANS**

All disadvantaged businesses deserve an opportunity to participate – small businesses owned by minorities and women *and* small businesses owned by nonminorities. Small businesses owned by minorities and women face unique obstacles which warrant unique opportunities. Benefits should always be based on relative need.

### **TWO: THE THREE NOS: No Quotas, No Guarantees, and No Exclusion**

We do not establish quotas which award a certain number of FCC licenses or other benefits to a particular group. Nor do we guarantee success to any group. Our rules should always ensure that the beneficiaries of our programs are committed to building businesses for the longterm, not flipping FCC licenses for a quick profit. Affirmative Opportunity seeks to ensure a fair opportunity to compete, not to exclude any competitor.

### **THREE: ONCE YOU GET A HAND-UP, YOU'RE ON YOUR OWN**

Government benefits are a finite resource and should be distributed widely and as needed. Affirmative Opportunity means fair entry-level opportunities for businesses in their early growth phases. There should be limits on how many times a particular member of a disadvantaged group is permitted to invoke the aid of government.

### **FOUR: MARKET-BASED INCENTIVES WORK BEST**

Government should provide opportunities to compete. But the market must ultimately decide which competitor will win. This is the reason why we use techniques such as tax certificates, bidding credits, installment payments and auctions to provide tools for small and minority businesses to attract capital to compete.

### **FIVE: ONLY DO WHAT'S COST EFFECTIVE**

We must continually test our programs under a rigorous cost-benefits analysis. The benefits should be proportional to the desired incentive; the program must be proportional to its costs.

March 6, 1995

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

March 7, 1995

IN REPLY REFER TO:

*Davy*

VIA TELECOPIER

Abner M. Mikva  
Counsel to the President  
Executive Office of the President  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

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I enclose a document outlining five principles that are useful in evaluating minority enterprise programs in the communications area. I thought you might find this information useful as the Administration begins to review federal affirmative action generally.

Please contact me (202/418-1700) if you have any thoughts or questions about the document. Thank you.

Sincerely,

*Bill*

William E. Kennard  
General Counsel

Enclosure

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March 6, 1995



the Commission alerted the Court to the pendency of that case in its motion for expedited consideration. Motion at 10 n.7. The Commission proposed sensible procedures to deal with any pertinent decision the Supreme Court might make in that case, suggesting that the parties be required to file supplemental briefs if that would be useful in this case. The procedures proposed in the Commission's motion would serve the interests of the parties and the public in prompt resolution of this case while allowing appropriate consideration of any intervening Supreme Court decision in Adarand that might be pertinent.<sup>3</sup>

2. Although TEC now asserts that its request for a stay is narrow (Opposition, at 7), that assertion is neither correct nor relevant to the request for expedited consideration. TEC did ask the Court for a stay that would permit it to participate in the auction; and it did propose that any license it obtains be subject to rescission if the FCC prevails. But TEC also asked, as part of its purportedly "narrow" stay request, that the Court stay those portions of the FCC rules that allegedly "discriminate against TEC's rural telephone companies on the basis of race and gender." Emergency Motion for Stay, at 1. Apparently realizing

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<sup>3</sup> TEC's argument ignores the fact that the constitutional issue is not the only issue for the Court in this case. Indeed, the constitutional issue was fifth in TEC's list of reasons why the Commission's order is likely to be set aside on the merits. Emergency Motion for Stay, at 5. And it was not even mentioned in TEC's motion asking the Commission for a stay. The Commission believes that expedited briefing in this case is necessary to resolve all uncertainty regarding the auction procedures as promptly as possible.

that its "narrow" request would put the Court in the uncomfortable position of parsing the Commission's auction procedures and carving out some provisions while leaving others, TEC asked in the alternative for a stay of the entire auction.

In its opposition to the stay motion (at 16-18), the Commission pointed out that either a narrow stay or a broad one would disserve the public interest. A stay allowing TEC (and others foreclosed by the rules) to participate in the auction while leaving the merits arguments unresolved would distort the auction by creating uncertainty among the designated entities as to the rules of the game. Inevitably, their ability to obtain financing, decisions on participating at all, and bidding strategies would be affected by even the "narrow" stay TEC seeks.<sup>4</sup> A stay of the entire auction, as we showed, might permanently harm the ability of auction winners ever to compete effectively, and thus might affect both the value of the licenses and the amounts received by the Treasury from the auctions. Although TEC is willing to endure some delay, the other potential bidders are anxious to proceed with the auction, as shown by their letters in support of our motion for expedition.<sup>5</sup>

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<sup>4</sup> For example, a designated entity that would participate in the auction and bid on Mississippi licenses in TEC's absence would need to consider whether it could outbid TEC. If TEC is in the auction, the designated entity might be unable to obtain financing or might change its strategy and bid on other licenses.

<sup>5</sup> TEC argues that the FCC can minimize the costs of delaying the auction of C block licenses by proceeding with the auction of licenses in the D, E, and F blocks. But holders of D, E, and F block licenses are unlikely to become direct competitors

3. The pertinent consideration here is that the Commission's proposal for expedited briefing is totally responsive to TEC's expressed concern that its challenges to the FCC's auction procedures may be resolved too late to have any effect on TEC's ability to participate. The FCC believes that TEC's challenges lack merit. Opposition to Stay, at 5-16. But its request for expedited briefing, which was prompted by TEC's filing of the stay motion, offers adequate assurances of a timely decision on the merits without either the distortion or the costly delay that a grant of TEC's motion inevitably would produce.

This Court's procedures recognize expedited treatment of cases on the merits as a preferred alternative to interim relief in appropriate circumstances. D.C. Circuit Handbook of Practices and Procedures, at 70-71. Thus, the Court may expedite cases "in which the public generally, or in which persons not before the Court, have an interest in prompt disposition." Id.<sup>6</sup> The

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of A and B block license holders or existing cellular providers because licenses in the D, E, and F blocks entitle holders to the use of only 10 MHz of spectrum. TEC's argument also ignores the fact that, under the Commission's rules, A and B block license holders may bid in the D and E blocks, though not in the C block (or the F block, also reserved for smaller businesses). As a result, D and E block licenses are unlikely to produce the beneficial competition that C block licenses will provide, assuming C block bidders receive their licenses in time to become effective competitors.

<sup>6</sup> The Court on its own motion often will expedite the briefing of a case in an order denying a motion for stay. See, e.g., American Tel. & Tel. Co. v. FCC, D.C. Circuit No. 93-1590 (Order of Nov. 15, 1993).

Commission framed its request for expedition in precisely these terms, while showing in addition that expedition was responsive to TEC's legitimate concerns that relief might come too late. Moreover, expedition (and not a stay) is particularly appropriate where Congress has directed the Commission to avoid "administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

For the reasons stated here and in our motion, the Court should issue an order adopting the briefing schedule proposed in the FCC's motion and should hear argument as early as its schedule permits.

Respectfully submitted,

William E. Kennard  
General Counsel

Christopher J. Wright  
Deputy General Counsel

John E. Ingle  
Deputy Associate General Counsel

James M. Carr  
Counsel

Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740

March 1, 1995

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Telephone Electronics Corporation, )  
Petitioner, )  
v. ) No. 95-1015  
Federal Communications Commission & USA, )  
Respondents. )

CERTIFICATE OF SERVICE  
-----

I, Sharon D. Freeman, hereby certify that the foregoing "Reply Of FCC To  
Opposition To Motion For Expedited Consideration" was served this 1st day of  
March, 1995, by mailing true copies thereof, postage prepaid, to the following  
persons at the addresses listed below:

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U.S. Dept. of Justice  
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Washington, DC 20530

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---

Sharon D. Freeman

\* Served by hand

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TELEPHONE ELECTRONICS CORPORATION,  
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,  
Respondents.

No. 95-1015

MOTION FOR EXPEDITED CONSIDERATION

The Federal Communications Commission hereby moves for expedited consideration of this case. We are asking the Court to move promptly to avoid delay of auctions for licenses to provide a new wireless telecommunications service. Prompt resolution of the issues presented is of vital importance to the federal government, the wireless telecommunications industry, and the general public. Indeed, every day the auctions are delayed potentially costs the economy, the treasury, the bidding companies, and consumers millions of dollars.

This case involves the use of auctions to award licenses for a new wireless telecommunications service known as broadband personal communications services ("PCS"). The development of a new broadband PCS industry promises not only to expand and improve the means of communication in our society, but also to create jobs and stimulate economic growth. Congress authorized the FCC to conduct auctions for the first time in 1993. In authorizing the FCC to hold auctions for licenses to provide emerging telecommunications technologies, Congress recognized the significant benefits that would result from the rapid deployment

of such new technologies as broadband PCS, and it accordingly directed the Commission to move quickly to award licenses for these new services. Indeed, Congress directed the Commission to avoid "administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A). The Commission responded expeditiously to fulfill this mandate; it held its first auctions (for nationwide narrowband PCS and interactive video and data services licenses) less than a year after Congress passed the legislation authorizing auctions. The Commission considers fulfillment of the Congressional directive of prompt dissemination of broadband PCS licenses to be one of the most important tasks currently facing the Commission. We are therefore taking the unusual step of urging this Court to expedite review of the Commission's order implementing Congress's instructions. To the best of our knowledge, this is the first time in recent history that the FCC has acted on its own initiative to seek expedited review of a case.

Congress required the Commission to ensure participation in the provision of broadband PCS by small businesses, rural telephone companies, and businesses owned by minorities and women, which are collectively known as "designated entities." 47 U.S.C. § 309(j)(4)(D). The petition for review in this case challenges some of the auction rules that the Commission has adopted to fulfill its statutory mandate to ensure the participation of designated entities in the broadband PCS industry. Any delay in resolving this case will clearly harm

those entities, as it will increase the difficulties in raising capital unless the legal uncertainty surrounding the FCC's auction rules is removed, and it will widen the headstart already obtained by their competitors. In fact, if designated entities do not promptly receive an opportunity to acquire broadband PCS licenses, they may not be able to compete effectively with cellular providers and other broadband PCS licensees. Under these circumstances, opportunity delayed would be opportunity denied, and the Commission would be thwarted in its efforts to fulfill its statutory mandate. Further, delay would also harm the general public by impeding the introduction and development of a competitive new telecommunications industry with the promise of substantial economic growth.

In light of the compelling significance of this case, "the public generally" and "persons not before the Court" "have an unusual interest in prompt disposition" of this case. See D.C. Circuit Handbook of Practice and Internal Procedures (1994), at 70. As we explain below (and in our February 17, 1995, opposition to the petitioner's Emergency Motion for Stay in this case), expeditious review, and not a stay of the agency's decision, would best serve the public interest in the unique circumstances of this proceeding. This is so because any delay occasioned by a stay might permanently damage the public interest that will be served by the ultimate implementation of the Commission's rules, whereas a grant of the motion for expedited

consideration will enable the Court to resolve this case on the merits before any of the alleged harms can befall the petitioner.

#### BACKGROUND

Telephone Electronics Corporation ("TEC") challenges two FCC orders that established rules for competitive bidding on certain broadband PCS licenses.<sup>1</sup> The Commission expects that broadband PCS "will provide a variety of mobile services competitive with existing cellular, paging and other land mobile services as well as new services offering communications capabilities not currently available."<sup>2</sup> In a 1993 amendment to the Communications Act, Congress authorized the FCC to award licenses for certain uses of the radio spectrum, including broadband PCS, by competitive bidding.<sup>3</sup> In authorizing the use of auctions, Congress specifically directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). Congress further directed the Commission

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<sup>1</sup> The orders challenged by TEC are Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532 (1994) ("Fifth R&O"), and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994) ("Fifth MO&O").

<sup>2</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4959 (¶ 3) (1994).

<sup>3</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 388 (1993).

to "consider the use of tax certificates, bidding preferences, and other procedures." Id.

The Commission adopted auction procedures to fulfill the Congressional mandate that designated entities "have opportunities to obtain licenses and provide service." Fifth R&O, 9 FCC Rcd at 5571 (¶ 93). One such procedure was the establishment of separate "entrepreneurs' block" auctions for certain broadband PCS licenses. 9 FCC Rcd at 5584-89 (¶¶ 118-129). Specifically, the Commission limited eligibility for the C and F block auctions "to entities that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million." 9 FCC Rcd at 5585 (¶ 121). The Commission explained: "The \$125 million gross revenue/\$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees." 9 FCC Rcd at 5586 (¶ 123).

The Commission also adopted bidding credits (i.e., discounts off the bid price) for specified designated entities. Small businesses<sup>4</sup> will receive a 10 percent bidding credit; businesses owned by minorities or women will receive a 15 percent credit;

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<sup>4</sup> The rules define a "small business" as "any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of \$40 million." Fifth R&O, 9 FCC Rcd at 5608 (¶ 175). This definition is consistent with recent amendments to the Small Business Act. See Pub. L. No. 102-366, Title II, § 222(a), 106 Stat. 999 (1992); 15 U.S.C. § 632(a)(2)(B)(ii).

and small businesses owned by minorities or women will receive a 25 percent credit. Fifth R&O, 9 FCC Rcd at 5589-91 (¶¶ 130-134). In addition, the Commission adopted an installment payment plan for all entrepreneurs' block auction winners, and enhanced this plan for small businesses and businesses owned by minorities and women by varying the moratorium on principal payments and the interest rate. 9 FCC Rcd at 5593-94 (¶¶ 139-140).

TEC, a holding corporation whose affiliates include six rural telephone companies and various other companies, petitioned for reconsideration of the Commission's affiliation rules. Those rules foreclose TEC from participating in the entrepreneurs' block auctions because TEC's gross revenues exceed \$125 million. The Commission denied TEC's petition for reconsideration. Fifth MO&O, 10 FCC Rcd 403 (1994). TEC then filed a petition for review of the Fifth R&O and the Fifth MO&O in this Court. TEC has indicated that it plans to assert several claims that the FCC's affiliation rules are arbitrary and capricious. TEC also intends to challenge the constitutionality of certain auction rules that benefit businesses owned by minorities and women. See TEC's Emergency Motion for Stay, February 10, 1995, at 7-17.

TEC asked the Court to stay either the challenged rules or the entire C block auction pending review. See Emergency Motion for Stay, February 10, 1995. The Commission opposed the stay motion, arguing primarily that any delay in the process of granting the C block licenses would disserve the public interest. Opposition of Federal Communications Commission to Emergency

Motion for Stay, February 17, 1995. In that opposition, the Commission stated that it intended to file a motion for expedited consideration. By granting this motion for expedition and deciding the case promptly, the Court would obviate any need to stay the auction.

#### ARGUMENT

The designated entities that plan to participate in the entrepreneurs' block auctions have a compelling interest in the prompt resolution of TEC's challenges to the Commission's auction rules. The first entrepreneurs' block auction -- for the C block -- is currently scheduled to commence 75 days after the conclusion of the ongoing A and B block auctions.<sup>5</sup> We expect the C block auction to commence in mid-May. Bidders must file application forms 30 days before the auction, or, if our expectation is correct, in mid-April. Bidders are expected to arrange for financing by entering into partnership agreements with other firms, and certain partners must be disclosed on the application forms. TEC's petition for review has raised doubts about the rules that will govern the auction, therefore making it difficult for designated entities to raise the capital necessary to participate in the auction. As the President of the Personal Communications Industry Association has advised the Commission, TEC's filing "has generated significant uncertainty among potential applicants and investors at a critical time when business plans are being developed and finalized and financial

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<sup>5</sup> See Public Notice, February 10, 1995.

institutions and investors are being asked to commit billions of dollars to a nascent industry." Letter from Jay Kitchen, President, PCIA, to Reed E. Hundt, FCC Chairman, Feb. 22, 1995.<sup>6</sup> This case should be resolved before the application forms for the C block auction are filed.

Of course, the Court could ensure that its resolution of TEC's claims will precede the entrepreneurs' block auctions by staying those auctions pending judicial review. But, as the Commission explained in its opposition to TEC's Emergency Motion for Stay, such an approach would exacerbate the adverse effects of uncertainty and delay on designated entities and on the public. Each day of delay in the entrepreneurs' block auctions would add to the competitive headstart that cellular providers and the winners of the ongoing A and B block broadband PCS auctions already have over any companies that ultimately win entrepreneurs' block licenses. As the Chairman of the Small Business PCS Association has stated, if TEC's stay motion is granted, "irreparable harm will be done to us by allowing current cellular license holders and big company PCS winners to cement an already large head start." Letter from Robert H. Kyle, Chairman, Small Business PCS Association, to William Caton, FCC Secretary, Feb. 22, 1995 (attached). Thus, unless the entrepreneurs' block auctions are held promptly, the winners of entrepreneurs' block licenses ultimately may be unable to compete effectively with

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<sup>6</sup> That letter is attached, along with a number of other letters from industry sources urging expeditious review.

cellular providers and A and B block licensees, whose superior access to capital and substantial headstart will give them a considerable competitive edge. Moreover, because their competitive position would deteriorate if the entrepreneurs' block auctions were stayed, designated entities would face greater difficulty in raising capital.

The general public will also suffer if those additional competitors are not able to enter the wireless communications market promptly and in an effective manner. The Commission expects additional competition to produce lower prices for consumers, more jobs, greater capital investment, and generally increased productivity.

In addition, any delay in holding the auctions will delay receipt by the federal treasury of the auction proceeds. On the basis of the amounts bid for A and B block licenses, it is realistic to expect that the receipts from the C block licenses will total in the billions of dollars. Interest lost as a result of delay will be lost forever -- and even the daily interest on billions of dollars is considerable.

Taking all of these factors into account, the Court should not stay the Commission's rules or the auction, but instead should give expedited consideration to TEC's petition for review. TEC's petition presents issues "in which the public generally, [and] in which persons not before the Court, have an unusual interest in prompt disposition." D.C. Circuit Handbook of Practice and Internal Procedures, at 70. Although the Commission

is confident that it ultimately will prevail on the merits, we believe that prompt resolution of any legal uncertainty concerning the auction rules in advance of the auctions will best serve the public interest by expediting the development of a competitive PCS market.<sup>7</sup>

To assist the Court in resolving this case in an expedited manner, the Commission proposes that the parties file simultaneous opening briefs on March 17, 1995, and simultaneous reply briefs on March 27, 1995. In addition, we respectfully urge the Court to schedule the case for oral argument as early after briefing as possible. These requests are in accordance with Congress's directive to promote the "rapid deployment of new technologies ... for the benefit of the public ... without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

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<sup>7</sup> A case now pending in the Supreme Court could result in a constitutional ruling that may be pertinent to the equal protection argument that TEC previewed in its Emergency Motion for Stay. See Adarand Constructors, Inc. v. Peña, cert. granted, 115 S. Ct. 41 (1994) (argued Jan. 17, 1995). The pendency of Adarand in the Supreme Court does not diminish the need for expedited consideration of this case. If the Supreme Court's disposition of Adarand should be pertinent to TEC's equal protection argument in this case, this Court may direct the parties to file supplemental briefs addressing the Supreme Court's decision. Cf. Southwestern Bell Corp. v. FCC, D.C. Cir. No. 93-1562 (Order of May 4, 1994) (directing parties to file supplemental briefs addressing Supreme Court decision that was issued after parties had filed their main briefs).

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for expedited consideration. The Court also should adopt the Commission's proposal for an accelerated briefing schedule.

Respectfully submitted,

William E. Kennard  
General Counsel

Christopher J. Wright  
Deputy General Counsel

John E. Ingle  
Deputy Associate General Counsel

James M. Carr  
Counsel

Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740

February 24, 1995

ATTACHMENTS



Personal  
Communications  
Industry  
Association

FEB 23 9 13 AM '95

OFFICE OF  
GENERAL COUNSEL

February 22, 1995

Chairman Reed E. Hundt  
Federal Communications Commission  
1919 M Street, N.W.; Room 814  
Washington, D.C. 20554  
MAIL STOP CODE: 0101

Re: Personal Communications Service/Designated Entity Regulations  
GEN Docket No. 90-314; C.A. No. 95-1015

Dear Chairman Hundt:

On February 10, 1995, Telephone Electronics Corporation ("TEC") filed an emergency motion with the United States Court of Appeals for the District of Columbia Circuit seeking to stay parts of the Commission's Personal Communications Service ("PCS") *Fifth Report and Order* and *Fifth Memorandum Opinion and Order*, or, in the alternative, to stay the application and auction process for the upcoming entrepreneurs' block PCS licenses. This filing, unfortunately, has generated significant uncertainty among potential applicants and investors at a critical time when business plans are being developed and finalized and financial institutions and investors are being asked to commit billions of dollars to a nascent industry. As you undoubtedly are aware, any uncertainty about the Commission's PCS regulations at this time will damage the prospects for a successful auction and have severe ramifications on the ability of entrepreneurs to participate meaningfully in developing the mobile radio infrastructure for the next decade.

With the entrepreneurs' block auctions just around the corner, potential applicants must have the regulatory certainty necessary to finalize their business plans. Although PCIA does not wish at this time to address the relative merits of TEC's appeal, PCIA believes that the mere pendency of TEC's stay request adversely affects the ability of potential applicants to prepare for the upcoming bidding and to make the entrepreneurs' block auctions a success. Under the

*Peter*

Chairman Reed E. Hundt  
February 22, 1995  
Page 2

circumstances, the Commission should act expeditiously to do what it can to resolve definitively all controversies surrounding the designated entity regulations.

Respectfully submitted,



Jay Kitchen, President  
Personal Communications Industry Association

cc: Commissioner James H. Quello  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Robert M. Pepper, Chief, Office of Plans and Policy  
William E. Kennard, General Counsel  
James U. Troup, Counsel to Telephone Electronics Corporation

**Small Business PCS Association**  
**96 Hillbrook Drive Portola Valley, CA 94028**  
**415-851-1615 FAX: 415-851-1870**

February 22, 1995

Mr. William Caton, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Dear Mr. Caton:

I am writing in behalf of the Small Business PCS Association in connection with the Petition filed in the United States Court of Appeals by Telephone Electronics Corporation (TEC) seeking to delay or eliminate the Designated Entity auctions scheduled for this Spring. The Small Business PCS Association is the largest association in the country dedicated to PCS with 85 company members.

As we understand it a large holding company with larger yet affiliates is arguing that (1) TEC should not be considered too large to qualify as a small business and (2) if TEC is too large that every small, minority or women-owned business in the country that does meet the FCC standards should not be allowed to participate in the Entrepreneurs' Block auctions.

When Congress decided to auction spectrum for the new PCS allocations there was major concern among some of us in the industry that this would reserve future frequency allocations to only those with the most money. This would change a long FCC tradition of awarding spectrum based on the merit of the applicant. After significant debate it was decided in Congress to balance the pure money factor in the auctions with an opportunity for small, minority, and women-owned businesses to participate. The FCC implemented this by establishing the separate Entrepreneurs' Block auctions specifically for small, minority, and women-owned businesses.

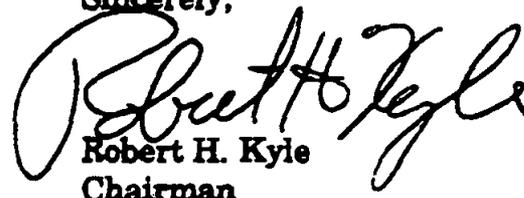
While the Entrepreneurs' Block regulations are not perfect, we believe that they represent an even-handed attempt to balance the interests of all small and medium-sized businesses planning to be involved in PCS.

We feel that the PCS Entrepreneurs' Block auctions represent the greatest opportunity of this decade for small businesses. But there is one serious risk - time. The big cellular companies have a number of years head start and they are racing even now to entice new subscribers before PCS licenses are awarded. In addition big companies now competing in the auctions for the unrestricted PCS licenses will obtain their licenses at least six months before the small companies bidding in the upcoming Entrepreneurs' Block auctions.

If the Petition by TEC is granted the opportunity of the decade will be lost for the small businesses of the country. If the Petition results in a delay of the auctions, irreparable harm will be done to us by allowing current cellular license holders and big company PCS winners to cement an already large head start.

Our Association supports in every way the Commission's effort for a quick disposition of the TEC Petition based on its merits.

Sincerely,



Robert H. Kyle  
Chairman

cc: William E. Kennard  
Anthony Williams

FEB 23 4 00 PM '95

PCS PRIMECO, L.P.  
c/o AirTouch Communications  
1818 N Street, N.W., Suite 800  
Washington, D.C. 20036

OFFICE February 23, 1995  
GENERAL COUNSEL

**BY FACSIMILE & MESSENGER**

William E. Kennard, Esquire  
General Counsel  
Federal Communications Commission  
Office of the General Counsel  
1919 M Street, N.W.  
Room 614  
Washington, D.C. 20554

Re: Telephone Electronics Corp. v. FCC, D.C. Circuit No. 95-1015

Dear Mr. Kennard:

PCS PRIMECO L.P. ("PRIMECO") understands that Telephone Electronics Corporation ("TEC"), a holding company consisting primarily of several rural telephone companies, has petitioned for judicial review<sup>1/</sup> of the orders establishing the Commission's rules and competitive bidding procedures governing the allocation of "Entrepreneur's Block" licenses to provide broadband Personal Communications Services ("PCS").<sup>2/</sup> In conjunction with its petition for review, TEC has sought a stay of the implementation of certain portions of the challenged orders to permit TEC to bid in the upcoming C-block Entrepreneur's license auction,<sup>3/</sup> or in the alternative, to stay the entire auction pending

1. See Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir.) (petition for review filed Jan. 6, 1995).
2. See In the Matter of Implementation of section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994), modified on reconsideration, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (released Nov. 23, 1994).
3. The Commission recently postponed the deadline for the C-block auction until 45 days after the completion of the ongoing A- and B-block broadband PCS auctions. See Public Notice, FCC Extends Short Form and Auction Dates for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band (Feb. 10, 1995).

William E. Kennard, Esq.  
February 23, 1995

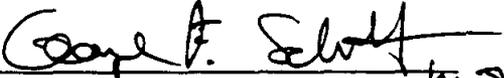
judicial review.<sup>4/</sup> The Commission last Friday opposed TEC's motion, but also stated for the court its belief that "the public interest would be best served by prompt resolution of TEC's petition for review," and that "prompt resolution of any legal uncertainty concerning the auction rules in advance of the auctions will expedite the introduction of PCS."<sup>5/</sup>

PRIMECO agrees that it is vital to ensure as much certainty as possible with respect to any legal and/or constitutional questions surrounding the Entrepreneur's Block rules. PRIMECO and many other companies are presently negotiating joint ventures with entrepreneurial businesses, including qualified women- or minority-owned small businesses, in anticipation of the upcoming auctions. Increased uncertainty in the process will severely jeopardize the formation of, and in particular, the availability of financing for such ventures in view of the much greater competitive risks engendered by legal and regulatory delay. Accordingly, PRIMECO strongly supports expedited judicial review of this matter.

Thank you for your consideration.

Sincerely yours,

PCS PRIMECO, L.P.

  
George F. Schmitt *by JHB*  
President and Chief Executive Officer

cc: Chairman Reed E. Hundt  
Commissioner James H. Quello  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness

James U. Troup, Esq.

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4. TEC Emergency Motion for Stay, No. 95-1015 (Feb. 10, 1995).

5. FCC Opposition to Emergency Motion for Stay, No. 95-1015 (Feb. 17, 1995), at 2.

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# MBELDEF

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## Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell  
Founder and Chairman

Anthony W. Robinson  
President

February 23, 1995

Mr. William Caton  
Secretary  
Federal Communications Commission  
1919 M Street, Northwest  
Suite 222  
Washington, D.C. 20554

Re: Telephone Electronic Corporation Case  
Petition for Expedited Hearing

Dear Sir:

The Minority Business Enterprise Legal Defense and Education Fund, Inc (MBELDEF) is a non-profit public interest organization founded in 1980 by former Maryland Congressman Parren J. Mitchell. MBELDEF serves as an advocate and legal representative for the minority business community in this country.

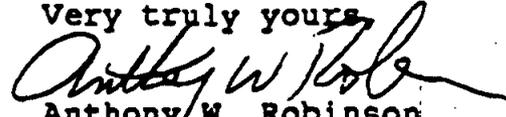
We are aware that Telephone Electronic Corporation (TEC) has filed an emergency motion with the United States Court of Appeals for the District of Columbia requesting a stay of the Federal Communications Commission's rules governing designated entities' participation in broadband PCS. The purpose of this writing is to urge the FCC to request an expedited hearing in this matter.

The record shows that on or about February 17, 1995, the FCC opposed TEC's motion for such a stay. However, without an expedited hearing in this matter, the issues involved herein could remain unresolved indefinitely.

When Congress passed the Omnibus Budget Reconciliation Act of 1993 and amended Section 309(j) of the Communication Act of 1934, it directed the FCC to ensure that small businesses, businesses owned by minorities and women, and rural telephone companies (designated entities) have the opportunity to compete for licenses and, in furtherance of competitive considerations, ultimately have the opportunity to offer PCS services. In its Order dated February 10, 1995, the FCC extended the due dates for short form applications to 45 days after the close of the A/B Block auctions. The C Block auctions should not and must not be delayed further because of any uncertainty surrounding TEC's motion. Thus, FCC's request for an expedited hearing is likely to eliminate the need for further delay of the C Block auctions.

Please feel free to contact me further if you require additional information on this important issue. If I am unavailable, please contact John A. Turner of my office.

Very truly yours,



Anthony W. Robinson  
President

cc: William E. Kennard  
Anthony L. Williams

**ALLIED COMMUNICATIONS GROUP, Inc.**  
4201 Connecticut Avenue, N.W.  
Suite 402  
Washington, DC 20008-1158  
(202)537-1500 (Voice)  
(202)244-2628 (Fax)

February 23, 1995

Hand Delivery

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, Northwest  
Washington, DC 20554

Dear Mr. Caton:

This Company is deeply concerned about what appears to be a dilatory tactic to derail the licensing of new PCS services, promoting competition in wireless communications and, in general, fulfilling the mandate of the Omnibus Budget Resolution Act of 1993.

As a consortia of minority owned entities, Allied has had occasion, as many others, to participate in F.C.C. proceedings related to the promulgation of rules and regulations governing the auctioning and licensing of PCS. While we have participated over the last year, the process has been underway for more than two years.

The Commission released its first Auction Order on October 12, 1993, wherein it set out Constitutionally permissible considerations pursuant to the directives from Congress, both with regard to maximizing diversity of license ownership to promote competition and ensuring that small businesses, rural telephone companies, and companies owned by women and minorities would have an opportunity to participate in this new and exciting industry.

On July 15, 1994, the F.C.C. released its seminal order outlining considerations for the "entrepreneurs' blocks". Although this basic structure has been modified since (to the detriment of ownership considerations for some designated entities, and holding periods) the rules have remained largely unchanged for rural telephone companies.

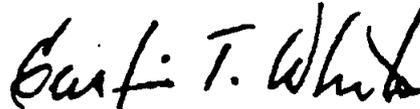
At any point over the last few months, the Petitioner in *Telephone Electronic Corporation v. F.C.C.* had a right, indeed, a duty, to step forward and voice whatever complaints it had. It chose, rather, to sleep on its rights, only now to awaken at the eleventh hour to request injunctive relief.

Mr. William F. Caton  
February 23, 1995  
Page Two

Although we presume the F.C.C. will file appropriate responses, we nonetheless take this opportunity to point out what we believe to be significant timing considerations for one requesting injunctive relief.

You may contact the undersigned should you have questions or require additional information.

Sincerely yours,

  
Curtis T. White

cc: Chairman Reed Hundt  
Commissioner James H. Quello  
Commissioner Andrew C. Barrett  
Commissioner Susan Ness  
Commissioner Rachelle B. Chong



**R. Gerard Salemmé**  
Vice President - Government Affairs

Suite 1000  
1120 20th Street, N.W.  
Washington, DC 20036  
202 457-3118  
FAX 202 457-3205

February 22, 1995

The Honorable Reed E. Hundt, Chairman  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, DC 20554

Dear Chairman Hundt:

AT&T Wireless has been following with great interest the federal lawsuit filed by Telephone Electronics Corp. ("TEC") seeking review of the Commission's rules governing competitive bidding for entrepreneur block licenses and seeking an emergency injunction to halt planned auctions reserved for entrepreneurs.

As a potential participant in PCS, the pendency of this litigation has two detrimental effects. First, we are unable to finalize our investment strategies with regard to the entrepreneur block licenses while there is a continuing question as to the legality of the licensing rules. Second, it compromises our ability to value the PCS licenses in the ongoing auction and in future auctions because of uncertainty regarding eligibility requirements for the entrepreneur block licenses. We therefore urge the Commission to use all resources available to it to resolve promptly the legal questions raised by the TEC suit. We understand that the Commission is considering the filing of a motion for expedited judicial review, and we would welcome such an initiative.

Please do not hesitate to call me should you have any questions regarding this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Gerard Salemmé".

R. Gerard Salemmé

c: Mr. William E. Kennard, General Counsel

**Access Plus Communications, Inc.**

•1880 Century Park East  
• Suite 1200  
• Los Angeles, CA 90067  
• Tel: (310) 551-9169  
• Fax: (310) 552-9038

FEB 23 4 36 PM '95

OFFICE OF  
GENERAL COUNSEL

Via Facsimile

February 22, 1995

Reed E. Hundt  
Chairman  
Federal Communications Commission  
Washington, D.C. 20554

Re: TEC Stay Petition--Request for Expedited Review

Dear Chairman Hundt:

I am writing on behalf of Access Plus Communications, Inc. (Access Plus), a company qualifying as a Designated Entity (DE) for the upcoming PCS auction in the C Block. We are concerned about the great deal of uncertainty that has been created by the Stay Petition filed by Telephone Electronics Corp. (TEC) on February 10, 1995.

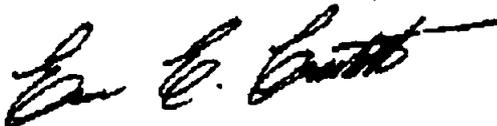
Because of this uncertainty, it has become increasingly difficult to raise funds from traditional funding sources. Quickly resolving the uncertainty around this issue would help Access Plus close certain funding agreements. In addition, we are concerned that the Stay Petition hearings may delay the entrepreneurs' block auction and subsequent granting of the C Block licenses. Any such delay would place Access Plus at a distinct disadvantage compared to MTA licensees regarding issues of "first-to-market."

On account of the foregoing, Access Plus requests that the D.C. Circuit Court expedite consideration of the merits of TEC's Stay Petition.

Chairman Hundt  
Federal Communications Commission  
February 22, 1995  
Page 2

I appreciate your consideration of this matter. If you have any questions, please contact me at (310) 551-9169.

Sincerely,  
Access Plus Communications, Inc.



By: Eric E. Castelblanco  
President

cc: William E. Kennard, Esq., Office of General Counsel  
Catherine J. K. Sandoval, Esq., Deputy Dir., Office of Comm. Bus.  
Opportunities



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEB 28 3 07 PM '95

OFFICE OF  
GENERAL COUNSEL

TELEPHONE ELECTRONICS  
CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS  
COMMISSION,

and

THE UNITED STATES OF AMERICA,

Respondents.

CASE NO. 95-1015

**OPPOSITION TO UNTIMELY MOTION FOR EXPEDITED CONSIDERATION**

James U. Troup  
D.C. Bar Number 394500  
Roger P. Furey  
D.C. Bar Number 375600  
Arter & Hadden  
1801 K Street, N.W., Suite 400K  
Washington, D.C. 20006  
(202) 775-7100  
Counsel for Petitioner  
Telephone Electronics  
Corporation

February 28, 1995

## INTRODUCTION

On October 12, 1993, the FCC released a Notice of Proposed Rulemaking, proposing to set aside two blocks of spectrum nationwide for bidding by designated entities composed of small businesses, rural telephone companies, or businesses owned by women or minorities.<sup>1</sup> Telephone Electronics Corporation ("TEC") filed comments on November 10, 1993, and reply comments on November 30, 1993. On July 15, 1994, the FCC released its Fifth Report and Order establishing two entrepreneurs' blocks, C and F, as a specific response to TEC's comments which demonstrated that a small, rural telephone company operating with only a 10 MHz or 20 MHz license could not offer a full range of personal communications services ("PCS") with a quality equivalent to the like offerings of a provider operating with a 30 MHz license.<sup>2</sup> At the same time, however, the FCC adopted rules prohibiting TEC's rural small telephone companies from bidding in the C or F block auction or obtaining bidding preferences available to other small businesses.<sup>3</sup>

TEC filed a petition for reconsideration with the FCC on August 22, 1994. TEC's president, its director of corporate relations, and its manager of operations development, met personally with FCC Chairman Reed Hundt on September 14, 1994 and were told that the FCC would study how its auction rules could be revised to permit all rural telephone companies to bid in the C block auction. In separate letters to FCC Chairman Reed Hundt, attached hereto as Exhibit 1, Senator Trent Lott and Congressman Gillespie Montgomery asked the FCC to grant TEC's petition for reconsideration stating that "prompt and

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<sup>1</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding in PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7655-7656 (1993).

<sup>2</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5587 (1994) ("Fifth Report and Order").

<sup>3</sup> Fifth Report and Order, 9 FCC Rcd at 5601, 5608.

favorable action on TEC's petition for reconsideration is essential to the State of Mississippi because it will allow Bay Springs Telephone Company to enter the wireless personal communications market and remain an economically viable provider of local telephone service to the small towns and rural areas of Mississippi." In the Fifth Memorandum Opinion and Order, the FCC denied with little explanation TEC's petition for reconsideration.<sup>4</sup>

On January 6, 1995, TEC petitioned for review of these two FCC orders that unfairly and illegally bar TEC's rural telephone companies from directly bidding in the auction for channel block C licenses, the only auction that provides them with any realistic opportunity to obtain licenses to provide broadband PCS. On the same date, TEC filed an Emergency Motion for Stay with the FCC. Over a month later, the FCC denied TEC's Emergency Motion for Stay.<sup>5</sup>

On February 10, 1995, TEC filed an emergency motion for stay with this Court. The stay requested by TEC is limited as it would authorize the FCC to rescind any licenses awarded to TEC's rural telephone companies and award those licenses to the second highest bidders in the unlikely event that this Court affirms the Commission's decisions on appeal. TEC's rural telephone companies will suffer irreparable harm unless this Court grants a limited stay of those provisions of the Commission's orders that improperly exclude these rural telephone companies from bidding in the auction for channel block C licenses. Such a limited stay provides this Court with a practical remedy for TEC's rural telephone

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<sup>4</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994) ("Fifth Memorandum Opinion and Order").

<sup>5</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order, PP Docket No. 93-253, DA 95-213 (released February 10, 1995).

companies should they prevail, other than ordering the FCC to reactivate all channel C licenses.

On February 24, 1995, the FCC filed a motion for expedited consideration (hereinafter referred to as the "FCC Motion").<sup>6</sup> The FCC wants this Court to render a decision in this case by mid-April.<sup>7</sup> The FCC also asks this Court to order the parties to file simultaneous opening briefs on March 17, 1995, and simultaneous reply briefs on March 27, 1995.<sup>8</sup>

The FCC Motion should be denied. As discussed below, the FCC has not shown that such abbreviated appellate proceedings are justified in this case. The FCC has neither demonstrated an emergency or the potential for irreparable harm that would justify denying TEC the normal time for presenting its case: 40 days for a petitioner's brief, 30 days for respondent's brief, and 14 days for petitioner's reply brief.<sup>9</sup>

The FCC bases its extraordinary request on the premise that TEC's petition for review is creating legal uncertainty concerning the FCC's auction rules.<sup>10</sup> However, such legal uncertainty is not engendered by TEC's petition for review. The possibility that a few

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<sup>6</sup> The FCC Motion is untimely. A motion to expedite must be filed within 30 days after the case is docketed. According to the January 12, 1995, order sent out by the Clerk's office at the time of docketing this case, all procedural motions should have been filed no later than February 13, 1995. The FCC's Motion was not filed until February 24, 1995, and was not accompanied by a motion for leave to file out of time as required by Rule 27(h). D.C. Circuit Handbook of Practice and Internal Procedure (1994), at 70.

<sup>7</sup> FCC Motion p. 7.

<sup>8</sup> FCC Motion p. 10.

<sup>9</sup> Fed. R. App. P. 31(a); see also D.C. Circuit Handbook of Practice and Internal Procedures (1994) at 77.

<sup>10</sup> FCC Motion pp. 7-8.

rural telephone companies may be allowed to bid in the auction for channel block C licenses should have little impact on the FCC's auction. The FCC's real concern lies with the case now pending before the Supreme Court. Adarand Constructors, Inc. v. Peña, cert. granted, 115 S. Ct. 41 (1994) (argued Jan. 17, 1995) asks the Supreme Court to confirm that "strict scrutiny" is the equal protection standard for reviewing an affirmative action program. The affirmative action program in Adarand is voluntary and far less discriminatory than the one embedded in the FCC's auction rules. Therefore, the public interest and judicial economy would be advanced by granting TEC's limited stay of the auction of the channel block C licenses, permit the FCC to proceed with its auction, and hold the ultimate resolution of this appeal in abeyance pending the Supreme Court's decision in Adarand.

#### DISCUSSION

**I. A Grant of the FCC's Extraordinary Request Would Unfairly Impair TEC's Ability To Accurately Present Its Case And, For No Valid Reason, Require This Court To Render A Hasty Decision Concerning The Important Statutory And Constitutional Issues Involved In This Appeal**

TEC has no desire to unnecessarily delay the auction of the C block licenses, but it does want a fair opportunity in this proceeding to protect its statutory and constitutional rights. Congress has expressly required that all such auctions be designed to ensure dissemination of licenses among a wide variety of applicants, including certain "designated entities": small businesses, rural telephone companies, and businesses owned by members of minority groups and women. 47 U.S.C. § 309(j)(3)(B). The FCC does not dispute that TEC's rural telephone companies meet the FCC's own definition of "rural telephone companies", or that they are "rural telephone companies" as that term is used by Congress in Section 309(j) of the Communications Act.

The FCC's auction rules also discriminate against TEC in violation of the equal protection principles of the Constitution. The FCC has imposed affiliation rules that exclude TEC's rural telephone companies from the auction for channel block C licenses. TEC's rural telephone companies would have qualified for bidding in the C block auction had the FCC not combined their gross revenue with the gross revenue of TEC's resellers. The FCC ignored the many corporate and regulatory barriers that prevent TEC's resellers from shifting any portion of their gross revenue to TEC's small regulated telephone companies. However, the FCC exempted large minority-owned companies from the same affiliation requirements.

The complex statutory and constitutional issues involved in this appeal warrant careful and thorough consideration. Expedition, in this case, is not required by statute. Furthermore, expedited consideration should be granted very rarely. "Because of the size of the Court's caseload, and the calendaring of cases months in advance of hearing, the Court grants expedited consideration very rarely."<sup>11</sup>

The FCC has provided no valid reason for denying TEC the normal time permitted by Rule 31(a) to prepare its opening brief, 40 days after the date the FCC files the administrative record. The FCC notified TEC only today that the administrative record upon which the FCC relies is 202 pages. In light of just the size of the record, TEC requires the ordinary time allowed for reviewing the record and preparing its opening brief. The FCC has provided no rationale for requiring simultaneous briefs rather than have the respondent serve and file its brief within 30 days after service of the petitioner's brief.<sup>12</sup>

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<sup>11</sup> D.C. Circuit Handbook of Practice and Internal Procedures (1994), at 70.

<sup>12</sup> The FCC notified TEC that the administrative record was filed only yesterday. TEC has asked the FCC for a copy. It will be difficult for TEC to prepare its case until it is successful in procuring a copy of the complete administrative record.

A motion for expedited action must explain the nature of the emergency, the FCC has identified none.<sup>13</sup> A party may also request expedited action on the ground that it is necessary to avoid irreparable harm.<sup>14</sup> However, a grant of TEC's limited stay would allow the FCC's auction to proceed promptly and obviate any need for the Court to rush its consideration of this appeal.

It took the FCC more than a month to act on the motion for stay TEC filed with the FCC. The FCC's announcement that it will voluntarily postpone the C block auction is further evidence that there is no emergency. The FCC stated that such a postponement was necessary to "allow more time before the close of the A/B block auction and the filing deadline for the C block auction to allow participants to complete business plans, raise financing, and negotiate with strategic partners." See Public Notice attached to the FCC's Response to Motion for Expeditious Consideration filed with this Court on February 14, 1995.

The FCC has based its unusual request on the premise that this Court's proceeding is causing legal uncertainty.<sup>15</sup> As discussed in greater detail below, the pendency of Adarand in the Supreme Court raises serious doubts about the constitutionality of the affirmative action program embedded in the FCC's auction rules. The FCC relied on the district court's opinion in Adarand when it decided to apply intermediate scrutiny to its auction rules.<sup>16</sup> Until the Supreme Court renders its decision in Adarand, which is

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<sup>13</sup> D.C. Circuit Rule 27(f).

<sup>14</sup> Id.

<sup>15</sup> FCC Motion pp. 3, 7, 10.

<sup>16</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2398 (1994).

expected before the end of its Term in July, there will be uncertainty regarding the legality of the FCC's auction rules. Pushing this Court's decision through prior to a final decision in Adarand will not prevent the filing of petitions to deny licenses to the winning bidders and subsequent appeals based on a decision in Adarand that requires the application of strict scrutiny to the FCC's auction rules. Therefore, this Court's resources and the public interest would be better served by holding the ultimate resolution of this appeal in abeyance a few months pending the Supreme Court's decision in Adarand.

The FCC also argues that this Court should abbreviate its appellate proceedings because its resolution affects persons not before the Court. Appeals of FCC decisions resulting from informal rulemaking proceedings, as here, will by their nature affect persons not before the Court. This is no justification for impairing a thorough consideration of the important statutory and constitutional issues raised by this appeal. None of the persons from whom the FCC solicited letters for its Motion requested intervention in this case.

**II. The Limited Stay Requested By TEC Avoids Any Need For This Court To Rush Its Consideration Of This Appeal**

The FCC alleges that abbreviating this Court's proceeding is preferable to a stay. The FCC contends that a stay would cause a delay, but chooses to ignore the limited nature of TEC's request for a stay.<sup>17</sup> TEC has requested this Court to grant a limited stay of the FCC's auction rules only to the extent necessary to permit TEC's rural telephone companies to bid in the auction for the channel block C licenses.<sup>18</sup> TEC recommended that the Court grant the FCC authority to rescind any licenses awarded to TEC's rural telephone companies and award those licenses to the second highest bidders in the unlikely event that

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<sup>17</sup> FCC Motion p. 8.

<sup>18</sup> TEC's Emergency Motion for Stay p. 18.

this Court affirms the Commission's decisions on appeal.<sup>19</sup> The limited stay requested by TEC, therefore, would not cause any delay.

The FCC's claim that this Court must rush its proceeding in order to prevent causing a headstart problem in the wireless telecommunications industry is ludicrous.<sup>20</sup> Cellular carriers have been offering service for ten years, and a few months delay is not going to have any measurable impact on any competitive advantage they already enjoy. Similarly, any competitive advantage enjoyed by the winners of the A and B block licenses is already built into the FCC's design of the auctions for the different blocks, because they are being held sequentially, instead of simultaneously. Furthermore, a less than thorough consideration of the issues raised in this appeal would allow current cellular license holders and big company PCS license winners to establish female or minority fronts in order to participate in the C block auction designed for only designated entities.<sup>21</sup> Finally, it is within the FCC's power to minimize any delay by proceeding with the auction of licenses for the D, E and F blocks.

The FCC's claim that the public will suffer if briefs are prepared and filed within the time proscribed by Rule 31(a) is also meritless.<sup>22</sup> TEC's stay, which is limited to

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<sup>19</sup> TEC's Emergency Motion for Stay p. 19.

<sup>20</sup> FCC Motion p. 8.

<sup>21</sup> The FCC attached to its Motion supporting letters from AT&T and PCS Primeco, L.P. As of the 90th round of the FCC's auction for the A and B blocks, AT&T was the highest bidder for one-third of the A block licenses. AT&T, through its ownership of McCaw Cellular, is already one of the largest cellular carriers. PCS Primeco is jointly owned by NYNEX Corporation, Bell Atlantic Corporation, AirTouch Communications, and US West, Inc. which also operate major cellular carriers. As of the 90th round, PCS Primeco was the highest bidder on broadband PCS licenses covering more than one-fifth of the B block licenses.

<sup>22</sup> FCC Motion p. 9.

permitting its rural telephone companies to participate in the bidding in the auction for the channel block C licenses, would promote the FCC's competitive objectives by allowing the C block auction to proceed immediately. TEC's rural telephone companies would be permitted to take their proper place with the other designated entities in the C block auction, and Congress's mandate to disseminate licenses to those companies that are already committed to providing PCS to rural areas could be fully met.

Contrary to Section 309(j)(7) of the Communications Act, the FCC has also asked this Court to consider the federal revenues that are expected from the C block auction.<sup>23</sup> Congress prohibited the FCC from considering the expectation of federal revenues when designing the auction to ensure the dissemination of PCS licenses to designated entities, specifically including rural telephone companies. Under the title "Consideration Prohibited", Section 309(j)(7)(A) states that "the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection."<sup>24</sup> Consequently, the FCC has already given away, through bidding credits, up to 25% of the receipts expected from the C block auction.

The limited stay requested by TEC would prevent any delay in the receipt by the federal Treasury of the proceeds of the C block auction. The limited nature of TEC's stay would allow the C block auction to proceed promptly. As already mentioned above, the FCC has already delayed the C block auction for its own purposes. The grant of TEC's limited stay would also allow the parties to thoroughly brief the complex statutory and constitutional issues raised in this case, avoid any unwarranted interference with the

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<sup>23</sup> Id.

<sup>24</sup> 47 U.S.C. § 309(j)(7)(A).

calendaring of other cases, and allot this Court the time that is ordinarily required to receive briefs and render a decision.

**III. This Court Should Hold The Ultimate Resolution Of This Case In Abeyance Pending A Decision By The Supreme Court In Adarand**

In Adarand, the petitioner has asked the Supreme Court to determine whether "strict scrutiny", as opposed to a lesser standard such as "intermediate scrutiny", is the proper standard of review for determining the constitutionality of a race-conscious affirmative action program adopted by Congress.<sup>25</sup> Under the affirmative action program at issue in that case, prime contractors working on federal highway projects have the option of hiring "disadvantaged business enterprises" ("DBE's") as subcontractors, in return for incentive payments from the government. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1540 (10th Cir. 1994). Businesses owned by women and members of certain minority groups are presumed to qualify as DBE's. Id. at 1541.

Relying in part on the 10th Circuit's decision in Adarand, the FCC has determined that the intermediate scrutiny standard applies to the race and gender-based preferences it has adopted in its auction rules.<sup>26</sup> The FCC also relied on Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). Id. If the Supreme Court rules in Adarand that the affirmative action program at issue in that case should be reviewed under a more stringent standard of review than the intermediate scrutiny standard, it is very likely that the same standard would be applicable to the FCC's auction rules. Both cases involve federal (as opposed to state or local) affirmative action programs which establish classifications and draw lines on the

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<sup>25</sup> See Petitioner's Brief, filed Nov. 7, 1994, attached hereto as Exhibit 2.

<sup>26</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2398 (1994).

basis of race or ethnic origin. Both cases involve situations where First Amendment and "diversity" concerns are not at issue, distinguishing these cases from Metro Broadcasting.

Even in Metro Broadcasting, where the majority held that the FCC's rules at issue in that case should not be considered under the strict scrutiny standard, Justice Stevens appeared to apply a standard of review more stringent than the intermediate scrutiny standard:

I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionable legitimate."

Id. at 601 (Stevens, concurring) (citing his dissenting opinion in Fullilove v. Klutznick, 448 U.S. 448, 534-535). Justice Stevens found that the recognized public interest in diversity of broadcasting provided the basis for placing that case in "the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment." Id. at 601 (footnote omitted). In addition to Justice Stevens' opinion, four justices (Justices O'Connor, Rehnquist, Scalia and Kennedy) dissented and argued that the strict scrutiny standard should have been applied. Metro Broadcasting, 497 U.S. at 603.

The FCC's auction rules will not lead to a greater diversity in the exchange of ideas or information, and will not further the public interest in broadcast diversity in any other way, because PCS is a common carrier service. As with traditional telephone companies, PCS licensees will not have any control over the content of the information that is transmitted over their networks. Important First Amendment values will not be served by the FCC's rules. Contra Metro Broadcasting, 497 U.S. at 567-8.

Instead, the only stated objective of the FCC's challenged auction rules is the general and somewhat vague objective of "promoting economic opportunity and competition". Furthermore, the FCC's auction rules have not been "specifically approved" or mandated by Congress. See Metro Broadcasting, 497 U.S. at 563 ("It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved -- indeed mandated -- by Congress."). Congress directed only that the FCC consider the use of "tax certificates, bidding preferences, and other procedures". 47 U.S.C. § 309(j)(4)(D). This is far different from the Congressional approval of the specific procedures involved in Metro Broadcasting. Metro Broadcasting, 497 U.S. at 560.<sup>27</sup>

Thus, based on the Supreme Court's opinion in Metro Broadcasting, including the concurring and dissenting opinions, there is a strong possibility that the Supreme Court will apply the strict scrutiny standard in Adarand, or at least some other standard higher than the intermediate scrutiny standard applied by the FCC. There is also the strong possibility, due to the similarities between this case and Adarand, that the Supreme Court's decision in Adarand will be extremely relevant to this Court's decision in this case.

The FCC has addressed Adarand only in a footnote and suggests that its significance is whether or not supplemental briefing might be required in this case. FCC Motion at 10, n.7. A decision in Adarand could have a far greater impact on this Court's consideration of TEC's petition for review, however, particularly if Adarand is decided after this Court has ruled in this case. If the FCC proceeds with its auction on the basis of this Court's ruling,

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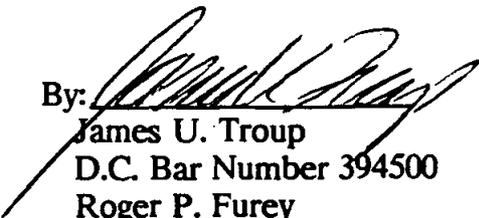
<sup>27</sup> Congress's action in approving the specific FCC programs in Metro Broadcasting after they were adopted by the FCC is in contrast to recent Congressional action disapproving the FCC's use of tax certificates on the basis of race or ethnicity. H.R. 831, 104th Cong., 1st Sess. (1994) (approved by the House of Representatives February 21, 1995, by a vote of 381 to 44. 141 Cong. Rec. H1921-53).

and a subsequent decision in Adarand casts new doubt on the constitutionality of the FCC's rules, many of the losing bidders will no doubt file petitions to deny the licenses awarded to the successful bidders on that basis. The auction may have to be set aside, the FCC's rules revised, and financial arrangements disrupted.

Although this Court obviously does not have to wait for the Supreme Court to rule in Adarand to act on TEC's petition for review, there are strong public policy reasons for exercising its discretion to do so (or at the very least to deny the FCC's admittedly unusual request for expedited consideration), as explained above. There also appears to be precedent in this Court for doing so under similar circumstances. See Lamprecht v. FCC, 958 F.2d 382, 386 (D.C. Cir. 1992) ("We had previously held this case in abeyance, and we reopened proceedings after the Supreme Court's decision [in Metro Broadcasting]."). TEC respectfully submits that it is in the public interest to avoid the repetitious litigation and uncertainty that could result if the Court accepts the FCC's invitation to rush to judgment in this matter before the Supreme Court rules in Adarand.

For these reasons, the FCC's Motion for Expedited Consideration should be denied.

Respectfully submitted,  
TELEPHONE ELECTRONICS  
CORPORATION

By: 

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Dated: February 28, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Opposition to Untimely Motion for Expedited Consideration has been made by hand-delivering copies thereof, this 28th day of February, 1995 to the following:

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# United States Senate

WASHINGTON, DC 20510-2403

September 16, 1994

Chairman Reed Hundt  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, D.C. 20554

Re: Petition for Reconsideration of the Fifth Report and Order in PP Docket No. 93-253 Concerning Auctions for Broadband Personal Communications Service Licenses

Dear Chairman Hundt:

I have been closely watching with great interest the proceeding at the FCC concerning the adoption of rules for auctioning licenses for broadband personal communication services ("PCS"). I strongly support Telephone Electronics Corporations' ("TEC") petition for reconsideration of the Commission's Fifth Report and Order.

I am concerned that the Commission has adopted gross revenue criteria that preclude a small, family-owned entrepreneurial company, such as TEC, from bidding directly in the auctions for the entrepreneurs' blocks and disqualify them from all small business bidding preferences. TEC operates Bay Springs Telephone Company, a rural telephone company providing service to rural areas of Mississippi. TEC began serving rural telephony needs in 1923, and now more than 70 years later, continues that service with a strong commitment to providing the same modern technology enjoyed in the most advanced urban areas. TEC struggles, as do you, to meet the challenges of providing state-of-the-art communication services to rural Mississippians.

Prompt and favorable action on TEC's petition for reconsideration is essential to the State of Mississippi because it will allow Bay Springs Telephone Company to enter the wireless personal communications market and remain an economically viable provider of local telephone service to the small towns and rural areas of Mississippi. The Census Bureau recently reported that the State of Mississippi has the highest level of households without telephone service of any state in the country. It is important to rural Mississippians to have access to advanced communications technology and innovative portable telecommunications. Initiatives such as TEC's entry into broadband PCS are crucial to the rural development of states like Mississippi because they help sustain the economic base of the many small communities scattered across the vast rural areas of

PLEASE REPLY TO:

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Chairman Reed Hundt  
September 20, 1994  
Page 2

our country. A grant of TEC's petition will help maintain the same quality of life for rural Americans that is enjoyed by their urban neighbors.

Should the Commission deny TEC's petition, it will severely harm Bay Springs' chances of participating in this new service at all, and will impair Bay Springs' chances of succeeding and growing. The efforts of you and your fellow Commissioners to prevent such an outcome has my utmost support. Your serious, expeditious consideration is appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Trent Lott". The signature is written in black ink and is centered on the page.

Trent Lott

bcc: Joseph D. Fail

VETERANS' AFFAIRS  
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Chairman Reed Hundt  
Federal Communications Commission  
Suite 814  
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Washington, D.C. 20554

Dear Mr. Chairman:

Because of my interest in the delivery of telecommunication services in rural areas, I am deeply interested in the adoption of rules for auctioning licenses for broadband personal communications services (PCS). I strongly support Telephone Electronics Corporation's (TEC) petition for reconsideration of the Commission's Fifth Report and Order.

It would appear the Commission has adopted gross revenue criteria that preclude a small, family-owned company, such as TEC, from bidding directly in the auctions for the entrepreneurs' blocks and disqualify them from all small business bidding preferences. TEC operates Bay Springs Telephone Company, a rural telephone company serving the counties of Jasper, Scott, Smith, Jones and Rankin, all of which are in my Congressional District. TEC has an outstanding record of over 70 years of telephone service in rural areas and a proven commitment to providing the same modern technology enjoyed in the most advanced urban areas. It would be a serious miscarriage of equity and fairness for the Fifth Report and Order in PP Docket #93-253 to be allowed to stand and thus deny TEC the right to participate in the auction.

Prompt and favorable action on TEC's petition for reconsideration is essential to the State of Mississippi because it will allow Bay Springs Telephone Company to enter the wireless personal communications market and remain an economically viable provider of local telephone service to the small towns and rural areas of Mississippi. The Census Bureau recently reported that Mississippi suffers from one of the highest levels of households without telephone service of any state in the nation. It is important to rural Mississippians to have access to advanced communications technology and innovative portable telecommunications.

-----  
September 14, 1994  
page two

Initiatives such as TEC's entry into broadband PCS are crucial to the rural development of states like Mississippi because they help sustain the economic base of the many small communities scattered across the vast rural areas of America. A grant of TEC's petition will help maintain the same quality of life for rural residents that is enjoyed by their urban neighbors.

I know of no compelling or legal reason why TEC's petition should be denied. As I stated earlier, a ruling in favor of the petition is a matter of fairness and equity. I know that you and the other Commissioners will reach the only just decision by granting the relief sought by TEC and approving the company's petition.

Thank you for your consideration.

Sincerely,

GILLESPIE V. MONTGOMERY  
Member of Congress

GVM:ac

---

No. 93-1841

NOV 7 1994

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1994

ADARAND CONSTRUCTORS, INC.,  
*Petitioner,*

v.

FEDERICO PENA, Secretary of Department of  
Transportation; THOMAS D. LARSEN, Administrator  
of the Federal Highway Administration; LOUIS N.  
MACDONALD, Administrator Region VIII of the  
Federal Highway Administration; and  
JERRY BUDWIG, Division Engineer of the Central  
Federal Lands Highway Division,

*Respondents.*

On Writ Of Certiorari  
To The United States Court of Appeals  
For The Tenth Circuit

**PETITIONER'S BRIEF**

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## ISSUES PRESENTED

1. Whether, in an as applied challenge, a congressional race-conscious set-aside program for awarding highway construction contracts survives constitutional scrutiny when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy the discrimination?

2. Whether "strict scrutiny," as opposed to "a lenient standard, resembling intermediate scrutiny," is the proper standard of review for determining the constitutionality of a race-conscious program adopted by Congress?

3. Whether the Fifth Amendment requires a federal agency, in implementing a federal race-conscious, set-aside program and when exceeding the goals adopted by Congress, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

## LIST OF PARTIES

Adarand Constructors, Inc. (Adarand) was Plaintiff in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit. Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Colorado and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel K. Skinner, in his official capacity as Secretary of the Department of Transportation (Mr. Skinner has since been replaced in his official capacity by Federico Pena); Robert E. Farris, in his official capacity as Administrator of the Federal Highway Administration (Mr. Farris has since been replaced in his official capacity by Thomas D. Larsen); Louis N. MacDonald, in his official capacity as Administrator of Region VIII of the Federal Highway Administration; and Jerry Budwig, in his official capacity as Division Engineer of the Central Federal Lands Highway Division.

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## OPINIONS FOLLOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, dated February 16, 1994, reported as *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994) and reproduced at pages 1 to 26 of the Appendix to The Petition for *Writ of Certiorari* (App.). The opinion and order of the District Court, dated April 21, 1992, *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D.Colo. 1992), are reproduced at App. 26 to 38.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment against Petitioner on February 16, 1994. (R. 10th Cir. # 26.)<sup>1</sup> The petition for *writ of certiorari* was filed on May 17, 1994. (R. 10th Cir. # 29.) The *writ of certiorari* was granted on September 26, 1994. (R. 10th Cir. # 31.)

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's challenge is based upon the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The Fifth

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<sup>1</sup> The Joint Appendix is designated as J.A. The Appendix to Petition for *writ of certiorari* is designated as "App." The record from the Tenth Circuit Court of Appeals is designated "R. 10th Cir. #," with the docket number and pages identified. The record from the United States District Court for the District of Colorado is designated "R. Colo. #," with the docket number and pages identified.

Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Respondents maintain that the challenged agency action is authorized by § 502 of the Small Business Act, (SBA) 15 U.S.C. § 644(g). (App. at 39-40.) The SBA, which applies to all federal procurement activities, requires the President to set an annual "goal" of not less than 5% for small businesses owned and controlled by "socially and economically disadvantaged individuals." 15 U.S.C. § 644(g)(1). The statute then states, in pertinent part:

Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

*Id.* The phrase "socially disadvantaged individuals" is defined as:

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). The phrase "economically disadvantaged individuals" is defined as:

Economically disadvantaged are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same

business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6). Moreover, racial minorities are "presume[d]" to be "socially and economically disadvantaged":

As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern -

(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

Funding for the project at issue in this case was provided by § 106 of the Surface Transportation and

Uniform Relocation Assistance Act of 1987 (STURAA) which provides, in pertinent part:

(a) FROM THE HIGHWAY TRUST FUND. - For the purpose of carrying out the provisions of title 23, United States Code, the following sums are hereby authorized to be appropriated . . . :

(8) FOREST HIGHWAYS. - For forest highways \$55,000,000 per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991.

(c) DISADVANTAGED BUSINESS ENTERPRISES. -

(1) GENERAL RULE. - Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) DEFINITIONS. - For purposes of this subsection -

(A) SMALL BUSINESS CONCERN. - The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by

the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$14,000,000, as adjusted by the Secretary for inflation.

(B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS. - The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto . . . .

Pub. L. 100-17, 101 Stat. 144-46 (1987), §§ 106(a) and (c).

## STATEMENT OF THE CASE

### A. Facts and Background

This case presents a challenge to a federal program, hereinafter "the Federal Construction Procurement Program," authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g), and funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987). The Federal Construction Procurement Program, which is funded by STURAA and which Respondents maintain is authorized by § 502 of the SBA [15 U.S.C. § 644(g)], provides the authority for a provision included in highway construction contracts by the Central Federal Lands Highway Division (CFLHD) entitled the "Subcontracting

Compensation Clause" (SCC).<sup>2</sup> The SCC is quoted in its entirety in the Joint Appendix at pages 24-27. Although Adarand does not challenge the constitutionality of STURAA, Adarand does challenge the constitutionality of § 106(c) of STURAA since it is that provision that incorporates by reference 15 U.S.C. § 637(d) of the SBA and thereby provides the "presumption" that listed minorities are "disadvantaged." The SCC is designated as § 108 of all sealed bids for highway construction contracts issued by the CFLHD.<sup>3</sup> (J.A. 24-27).

As a contracting agency within the FHWA, the CFLHD is apportioned a share of the FHWA's annual goal for small "disadvantaged" business participation. (R. 10th Cir. # 11, Aplt. App. 349-350.) The small disadvantaged business goal established by the FHWA for the CFLHD was between 12% and 15% of the approximately \$40 million in funding that the CFLHD receives annually for its highway construction projects. (R. 10th Cir. # 11, Aplt. App. 347.) The CFLHD uses three means to achieve its share of the goal: (1) awarding contracts to small "disadvantaged" businesses by competitive bid; (2) awarding contracts to the Small Business Administration under the section 8(a) program, 15 U.S.C. § 637(a), which then allocates the contracts to "disadvantaged" firms

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<sup>2</sup> The CFLHD is a regional subsidiary of the Federal Lands Highway Program (FLHP). The FLHP is subordinate to the Federal Highway Administration (FHWA), which is, in turn, part of the U.S. Department of Transportation (DOT).

<sup>3</sup> "[T]he [SCC] clause is included in all sealed bidding contracts, it is not included in the 8(a) contracts. . . . [Because the 8(a) contracts go exclusively to Disadvantaged Business Enterprises], we do not put the SCC into those contracts." (R. 10th Cir. # 14, DOT App. 74-75.)

only; and (3) encouraging firms, by means of financial incentives, that win prime contracts to award sub-contracts to "disadvantaged" firms.<sup>4</sup> It is the third mechanism that is at issue in this case. The CFLHD required the inclusion of the SCC provision in its sealed bid contracts as a means of achieving the goals established pursuant to 15 U.S.C. § 644(g). (R. 10th Cir. # 11, Aplt. App. 316-317 & Aplt. App. 342.)<sup>5</sup>

Adarand Constructors, Inc., (Adarand) is a highway construction company that specializes in the installation of highway guardrail systems and highway signs. Adarand has been engaged continuously in this business since 1976 and has substantial expertise in the performance of these tasks. (J.A. 33.) Adarand is not eligible for a presumption that it qualifies for certification as a "Disadvantaged Business Enterprise" under the SBA because its "management and daily business operations are controlled by" Randy Pech, who is a white male. (J.A. 32.) 15 U.S.C. § 637(d)(3)(C).

The function of the CFLHD is to supervise the construction and maintenance of highways on federally-

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<sup>4</sup> (R. 10th Cir. # 11, Aplt. App. 316-317; Aplt. App. 342; Aplt. App. 345-346.)

<sup>5</sup> At the end of each fiscal year, federal agencies, including DOT, submit reports to the Small Business Administration on the extent of federal procurement contracting participation by small businesses and DBEs, including an explanation of any failure to meet the agency-wide goal. 15 U.S.C. § 644(h). The reports are compiled by the Small Business Administration and submitted to the President and Congress. *Id.*

owned lands within its geographic region.<sup>6</sup> The CFLHD does not certify businesses as Disadvantaged Business Enterprises.<sup>7</sup> Rather, it relies on the states and the Small Business Administration to provide that certification.

On August 10, 1989, the CFLHD issued a solicitation for bids for the construction of a 4.7 mile section of highway located in the San Juan National Forest (the West Dolores Project). (R. 10th Cir. # 11, Aplt. App. 103-312.) The West Dolores Project is located approximately 400 miles from Denver in the extreme southwestern corner of Colorado in Montezuma and Dolores Counties near the Four Corners Area. The construction site is located hundreds of miles from Salt Lake City, Utah; Albuquerque, New Mexico; and Phoenix, Arizona. Furthermore, both counties in which this project took place are sparsely populated: 10.05 and 1.34 people per square mile, respectively.<sup>8</sup>

<sup>6</sup> The geographic region of the CFLHD includes all or part of the following states: Colorado, Nebraska, North Dakota, California, Wyoming, Utah, Arizona, New Mexico, Texas, South Dakota, Nevada, Kansas, and Hawaii. (R. 10th Cir. # 11, Aplt. App. 319-320.)

<sup>7</sup> The CFLHD accepts, as a DBE, any entity certified as such by a "state or the Small Business Administration." (R. 10th Cir. # 14, DOT App. 44-45; DOT App. 104; and R. 10th Cir. # 11, Aplt. App. 315). "[T]he type of proof of social disadvantage accepted by CFLHD for purposes of its SCC provision is that type of proof required for certification of small business concerns by SBA for the 8(a) program, 15 U.S.C. § 637(a), set out in 13 C.F.R. § 124.105, and by state highway agencies for Department of Transportation programs pursuant to the standards of 49 C.F.R. §§ 23.51, 23.53 and subpart D, Appendix C." (R. 10th Cir. # 11, Aplt. App. 315)

<sup>8</sup> *Colorado Population Counts and Estimates, 1980-1983*, Published by the Colorado Division of Local Government.

Section 108 of the contract for the West Dolores Project was the SCC provision. (J.A. 24-27.) The SCC offered a monetary reward to all prime contractors who would hire "disadvantaged" subcontractors to perform work constituting more than 10% of the overall contract amount.<sup>9</sup> (J.A. 25.) The SCC was based on a uniform version of the same which was issued by the Administrator of the FLHP in 1981 and is used in all three regions of the FLHP. (R. 10th Cir. # 11, Aplt. App. 326-327.)

The term "disadvantaged business enterprise" (DBE) is presumed to include all small businesses owned and operated by Blacks, Hispanics, Asians, Native Americans, and "other minorities".<sup>10</sup> (48 C.F.R. § 52.219-8; 13 C.F.R. § 124.105(b)<sup>11</sup>; R. 10th Cir. # 11, Aplt. App. 286.) Businesses owned or operated by white men are not presumed to be "disadvantaged."

<sup>9</sup> The CFLHD requires that at least 10% of the cost of the contract be awarded to one or more DBEs before a prime contractor is entitled to the bonus under the SCC. (R. 10th Cir. # 14, DOT App. 52-53). The 10% minimum is taken from the percentage required by Section 105(f) of the Surface Transportation Assistance Act, (STAA) Pub. L. 97-424, 96 Stat. 2100, and Section 106(c) of STURAA Pub. L. 100-17, 101 Stat. 145-46. (R. 10th Cir. # 14, DOT App. 103).

<sup>10</sup> For a highway construction company to qualify as a "small business," it may not have annual receipts that exceed \$17 million. 13 C.F.R. § 121.601 (SIC 1611-1629). This represents the \$14 million figure under STURRA, cited on p.5, adjusted for inflation.

<sup>11</sup> The "other minorities" presumed by the Small Business Administration to be "disadvantaged, include, but are not limited to, persons with origins in: Burma, Singapore, Laos, Republic of the Marshall Islands, Federated States of Micronesia, Fiji, Kiribati, Sri Lanka, and Bhutan.

The size of the bonus offered to the prime contractor under the SCC provision was equal to 10% of the final amount of the DBE subcontracts, not to exceed 2% of the final prime contract amount (1.5% if the prime contractor only contracts with one DBE subcontractor). (R. 10th Cir. # 11, Aplt. App. 286.) Moreover, the CFLHD required prospective prime contractors to include in their bids an amount for compensation under the SCC program regardless of whether the prime contractors intended to collect the bonus.<sup>12</sup> Thus, a prime contractor could not gain an advantage in the competition to submit the lowest-priced bid by agreeing to forego the benefits available under the SCC provision.<sup>13</sup> (R. 10th Cir. # 11, Aplt. App. 349.)

On September 15, 1989, the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel). (R. 10th Cir. # 11, Aplt. App. 114.) Shortly thereafter, Adarand submitted a bid to Mountain Gravel seeking to subcontract the guardrail portion of the highway construction project. (J.A. 30 & 34.) Adarand's bid quoted a lower price for the work than any other bid. (J.A. 30 & 34.) However, because of the SCC, Mountain Gravel "felt compelled to give the subcontract of the guardrail work

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<sup>12</sup> In this case the bonus to be included in each prime contractor's bid was \$30,000.00. (R. 10th Cir. # 11, Aplt. App. 118.)

<sup>13</sup> The CFLHD selects the lowest responsive bid for all projects under the sealed bidding process. (R. 10th Cir. # 14, DOT App. 81). The selected prime contractor must report all DBE and non-DBE subcontracts to the CFLHD. (R. 10th Cir. # 14, DOT App. 105-106). The CFLHD includes this information in a monthly report. (R. 10th Cir. # 14, DOT App. 37).

to Gonzales Construction." (J.A. 30.) Thus, the uncontroverted evidence is that:

the primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately \$10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.

[B]ut for the requirements of the Federal Highway contracts which encourage prime contractors (sic) to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC.

(J.A. 30-31.)

## B. Decisions Below

On August 10, 1990, Adarand filed an action in the United States District Court for the District of Colorado challenging the constitutionality of the use, by the CFLHD, of the contract provision referred to as the SCC, since the express purpose of the SCC is to induce prime contractors, on federal highway projects, to hire subcontractors based on the race of their owners, rather than the amount of their bids.

Cross Motions For Summary Judgment were filed on April 24, 1991. In Defendants' Brief in Support of Motion for Summary Judgment, Respondents argued that "here as in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)], Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by practices that perpetuated the effects of prior discrimination." (R. Colo. # 19, Brief 21.)

In their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion For Summary Judgment (Memorandum in Opposition), Respondents argued that the "compelling governmental interest" for the Federal Construction Procurement Program is set forth in the findings of Congress as follows:

(1) With respect to the Administration's business development programs the Congress finds

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of the national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among suppliers and promoting economy in such procurements.

15 U.S.C. § 631(f)(1). (R. Colo. # 36, Brief 6-7.)

In their Memorandum in Opposition, Respondents also stated:

Clearly, Congress had available to it in 1978 the historical record of discrimination that the Supreme Court has found sufficient to support the preferences contained in the PWEA. . . . Because the use of the SCC is directly traceable

to Congressional findings as to the need to remedy the historical underutilization of DBEs in Federal procurement, Congress has identified the compelling interest for its use.

(R. Colo. # 36, Brief 8-9.)

On April 21, 1992, the District Court issued an opinion and order denying Adarand's Motion For Summary Judgment and granting the United States' Motion For Summary Judgment.

On August 5, 1992, after obtaining an order granting a timely-filed Motion For Extension Of Time To File An Appeal, Adarand filed a Notice Of Appeal with the United States Court of Appeals for the Tenth Circuit.

Respondents filed with the United States Court of Appeals for the Tenth Circuit the following list of "evidence" that Congress considered when it enacted 15 U.S.C. § 644. The items listed were as follows:

133 Cong. Rec. 33321 (1987) (testimony of Cong. Mfume); 133 Cong. Rec. 33321-33322 (1987) (testimony of Cong. Meyers); 133 Cong. Rec. 33322 (1987) (testimony of Cong. Gallo); Minority Business Development Program Reform Act of 1987: Hearing Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 109-110 (1988) (statement by Sen. D'Amato); *Id.* at 193-202 (statement by Sen. Levin); *Id.* at 8, 189-191 (statement by Sen. Kerry); *Id.* at 15-18 (statement by Sen. Sasser); 134 Cong. Rec. 31491-31492 (1988); 134 Cong. Rec. 30057 (1988); 133 Cong. Rec. 33314-33316 (1987) (testimony of Cong. LaFalce); The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Committee on Small Business, 100th Cong., 2d Sess.

(1988); A bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the House Subcommittee on Procurement, Innovation, and Minority Enterprise Development, Committee on Small Business, 100th Cong., 1st Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program; Hearings Before the Senate Small Business Committee, 100th Cong., 1st Sess. (1987); 134 Cong. Rec. 31493 (1988) (statement of Sen. Weiker); H. Conf. Rep. No. 1070, 100th Cong., 2nd Sess. 73 (1988), reprinted in 1988 U.S.C.C.A.N. 5401, 5507; 124 Cong. Rec. 29641 (1978) (testimony of Sen. Glenn); *id.* at 2944 (statement by Sen. Heinz); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's Pt. 1, House Committee on Small Business, 97th Cong., 1st Sess. (1981); see also Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business, 97th Cong. 2d Sess. (1982); *id.* at 10, 33-34, 65, 106, 114, 118, 120, 220, 221, 241; Small Business and the Federal Procurement System, Hearings Before the Subcommittee on General Oversight, House Committee on Small Business, 97th Cong., 1st Sess. (1981); Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Hearings on Women Entrepreneurs: Their Success and Problems

Before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); Hearing on the State of Hispanic Small Business in America; Minority Enterprise and General Small Business Problems of the Committee on Small Business, 99th Cong., 2d Sess. (1986).

(R. 10th Cir. # 14, Brief 29-34.)

In an opinion dated February 16, 1994, *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The Tenth Circuit held:

*Fullilove* controls. . . . [I]f Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality. (App. 15.)

If particularized findings to justify implementation of a federal remedial program are not required of a state . . . they clearly are not required of a federal agency, such as CFLHD, which Adarand concedes is obliged to administer the remedial program.<sup>14</sup>

<sup>14</sup> The Tenth Circuit states: "The conclusion that CFLHD is acting with the bounds of the statutory authority of the Small Business Act is impelled by Adarand's own concession that the CFLHD's implementation of the SCC program was not beyond the agency's delegated power under section 502." (App. 21.) Adarand made no such concession. Adarand consistently argued, in its opening brief and its reply brief, that the SCC provision was beyond the mandate of Congress. (R. 10th Cir. # 11, Brief 16-28 and R. 10th Cir. # 17, Brief 3-9.)

The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities. (App. 18.)

We also disagree with Adarand's argument that Congress must mandate precise percentage goals for minority small business participation. Such a position ignores the principle lesson of *Fullilove*. The splintered *Fullilove* Court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and ethnic preference, satisfied equal protection requirements. (Emphasis in original.) (App. 21.)

Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program is narrowly tailored to achieve the remedial purpose of section 502. We hold that it does.<sup>15</sup> (App. 22.)

<sup>15</sup> The statement that "Adarand stipulates" is a mischaracterization of Adarand's Reply Brief. The Brief states: "Adarand concedes, *for the sake of discussion*, that the evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*. However this concession is not enough to save the Federal Defendants' argument." (App. 43.) (Emphasis added.) By adding the language "for the sake of discussion," Adarand was stating that for purposes of the discussion it could be assumed that the evidence met the requirements of *Fullilove*. This is much different from a stipulation. Adarand simply did not stipulate as indicated by the opinion of the Tenth Circuit.

Having rejected Adarand's arguments, and having held that the district court did not err in relying on *Fullilove* rather than *Croson*, that accordingly, no *Croson* findings were necessary, and that the Small Business Act which authorized the SCC program meets the constitutional requirements, we affirm the district court's order of April 21, 1992, in favor of the Government. (App. 24.) (Internal citations have been omitted.)<sup>16</sup>

A Petition for writ of certiorari was filed on May 17, 1994. The writ of certiorari was granted on September 26, 1994.

### SUMMARY OF ARGUMENT

When it adopted the Federal Construction Procurement Program at issue in this case, Congress selected race as the primary factor for the awarding of federal construction procurement contracts by the federal government. The use of race is the use of a classification that undermines the Constitution's guarantee of equal protection.

In considering the use of race by Congress regarding such matters as the issuance of federal construction contracts, this Court has traditionally used "the most rigid scrutiny" to determine whether Congress has violated the equal protection component of the Due Process Clause of

the Fifth Amendment. Regarding issues such as federal construction contracts, no decision of this Court has ever departed from the application of "strict scrutiny." While this Court has held that a lesser standard of review may apply when First Amendment issues are at stake, First Amendment issues are not involved in this case. Moreover, this Court has refused to impose a lesser duty on the federal government in meeting the Constitution's requirement for equal protection.

The application of "strict scrutiny" to the race-conscious Federal Construction Procurement Program requires that the federal government demonstrate both a "compelling governmental interest" for using race and that the means selected is "narrowly tailored." An examination of the federal government's alleged factual basis for adopting the race-conscious program reveals that it contains no evidence of a pattern or practice of discrimination; merely asserts what it purports to prove; and, at best, is an allegation of "societal discrimination." Thus, there is no evidence of a "compelling governmental interest."

The existence of the race-conscious Federal Construction Procurement Program for more than thirteen years, with no end in sight, demonstrates that it is not "narrowly tailored." Moreover, since the program is not linked to identified discrimination, it is impossible to assess whether the program is "narrowly tailored."

Even if "intermediate scrutiny" were the proper standard for reviewing the constitutionality of the race-conscious Federal Construction Procurement Program, and it is not, the program fails to survive. Even under the relaxed standard, Congress failed to provide "meaningful

<sup>16</sup> Although the Tenth Circuit Court of Appeals stated that the CFLHD was "not itself subject to the STURAA implementing regulations," the Court made no finding regarding the application of STURAA to this case. (App. 8.)

evidence" that "actually comports with fact" to justify its use of race in awarding federal contracts. In addition, the means selected were not "substantially tailored" since "maximum practicable" permits the award of federal contracts far beyond that necessary to ameliorate past discrimination, that is, rising to 100 percent. This is especially the case since the race-conscious program has no logical stopping point.

The fact that it is a private individual who has made the decision to issue a subcontract on the basis of race is irrelevant since that individual is provided a financial inducement, under the race-conscious provisions of the Federal Construction Procurement Program, to engage in that conduct. The fact that this act is authorized by federal law and undertaken with federal funds makes it an action by the federal government.

While Congress may have had a basis for the adoption of a program authorizing the set-aside of 5 percent of government contracts on the basis of race, although Adarand disputes that it had such a basis, the decision by the CFLHD to adopt a program in which 12 to 15 percent of its contracting funds are apportioned on the basis of race is without the factual basis required by this Court. The CFLHD has demonstrated neither a "compelling governmental interest" for its decision nor that its program is "narrowly tailored."

## ARGUMENT

### I. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM MAKES RACE THE DECIDING FACTOR IN THE AWARD OF MANY FEDERAL CONSTRUCTION SUBCONTRACTS.

The Federal Construction Procurement Program not only employs race as a factor, race is the primary factor

used to determine whether an enterprise is a DBE and, therefore, entitled to the preferential treatment accorded under the program implemented by the CFLHD.<sup>17</sup> That is, an individual is presumed to be "disadvantaged" if that individual is one of those listed. The Federal Construction Procurement Program does not define "disadvantaged" in "race-neutral terms," instead the program presumes that members of the listed races are "disadvantaged."

Thus, the payment of a monetary bonus to a prime contractor, in accordance with the SCC provision, turns upon the race of the subcontractor. The definition of "social and economic disadvantage" obviously favors racial minorities:

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<sup>17</sup> 15 U.S.C. § 644(g)(2)(B) specifically incorporates by reference § 8(a) [15 U.S.C. § 637(a)] of the SBA and makes no reference to section 8(d) [15 U.S.C. § 637(d)]. Section 8(d) is the provision that contains the "presumption" regarding race.

The SBA, over the history of the program and since the inclusion of § 8(d), has, however, treated § 8(a) and § 8(d) as interchangeable. In other words, the Small Business Administration, and other agencies that use the regulations promulgated by the Small Business Administration, including the Department of Transportation (DOT), have treated § 8(a) and § 8(d) as if the presumption applied to both. Congress has, over the years, had many opportunities to reverse this policy of the Small Business Administration and has failed to do so. Furthermore, the Justice Department has conceded that the SBA is race-conscious. (Opp. to Pet. 3.)

In any event, the funding for the West Dolores project was provided by § 106(a)(8) of STURAA and STURAA incorporates by reference the SBA's presumption under 15 U.S.C. § 637(d). Pub. L. 100-17, 101 Stat. 146, § 106(c).

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). "Economically disadvantaged" means:

those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6).

Thus, only individuals who are "socially disadvantaged," that is, of certain specified racial and ethnic status can be "economically disadvantaged."<sup>18</sup> In addition, racial minorities, and only racial minorities, are entitled to a presumption of "disadvantage" as follows:

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<sup>18</sup> States or other governmental bodies receiving federal highway funds (recipients) must determine whether an entity is "disadvantaged." If the entity seeking certification is not a "minority" the governmental body looks no further; the entity is presumed not to be "disadvantaged." Economic data is not examined, other than to establish that the business is "small," that is, it has annual receipts of less than \$17 million.

"Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination." 49 C.F.R. Pt. 23, Subpt. D, App. C. (Emphasis added.)

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status," *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978), and that the Constitution's guarantee of equal protection is violated if persons of different races "are not accorded the same protection." *Id.* (Emphasis added.) The Federal Construction Procurement Program is race-conscious. Under that program, a member of a listed minority group obtains DBE status merely by proving that individual's membership in one or more of the "presume[d]" disadvantaged minorities.<sup>19</sup> Once membership in one of the groups "presume[d]" to be disadvantaged is established, the individual is certified as a DBE.<sup>20</sup>

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<sup>19</sup> See 13 C.F.R. 124.105(b); and 48 C.F.R. § 52.219-8.

<sup>20</sup> "In making certification decisions, the recipient (state or local government) relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition). This is the inverse of the situation described in footnote 18. That is, if the entity seeking certification is a "minority," the governmental body looks no further; the entity is presumed to be "disadvantaged." Economics is not examined, except to establish that the "business" is a "small business." See footnote 7 for an explanation of why the above cited regulations are applicable to this case.

Nothing else is required.<sup>21</sup> The Federal Construction Procurement Program is clearly race-conscious because it establishes classifications and draws lines on the basis of race or ethnic status.

## II. STRICT SCRUTINY IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-CONSCIOUS PROCUREMENT PROGRAM, INCLUDING ONE MANDATED BY CONGRESS.

The Federal Construction Procurement Program is race-conscious and, as such, is subject to strict scrutiny under the Equal Protection component of the Due Process Clause of the Fifth Amendment since "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987). This Court traditionally uses "the most rigid scrutiny" in considering violations of the equal protection component of the Due Process Clause of the Fifth Amendment. *Korematsu v.*

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<sup>21</sup> Although the DBE status of a minority can be "rebutted," the burden to "rebut" the DBE status of an entity is placed on third parties. 49 C.F.R. § 23.69. Thus, the party challenging the DBE status of an entity must provide evidence that the challenged minority is not "socially and economically disadvantaged." The burden is on the wrong party. The party seeking to be benefitted by the program should have the burden of proving, not just his race or ethnic origins, but the nature of his "social" and/or "economic disadvantage." Moreover, the burden should be on the federal government to ensure that the benefits of a federal program are accruing to entities based upon their economic disadvantage, not just their race.

*United States*, 323 U.S. 214, 216 (1944).<sup>22</sup> "Most rigid scrutiny" is "strict scrutiny." In fact, Justice Marshall, in his concurring opinion in *Fullilove*, recognized that the "conventional" test for reviewing "governmental programs employing racial classifications" is "strict scrutiny." *Fullilove*, 448 U.S. at 519.

Nonetheless, the Tenth Circuit Court of Appeals applied a different and, therefore improper, standard of review to the race-conscious government contracting program challenged herein:

[I]f Congress has expressly mandated a race-conscious program, a court must apply a *lenient standard, resembling intermediate scrutiny*, in assessing the program's constitutionality.

(App. 15.) (Emphasis added.) The United States Court of Appeals for the Tenth Circuit reached its conclusion by combining the *Fullilove* opinion authored by Chief Justice Burger with the concurring opinion in that case authored

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<sup>22</sup> "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. at 216. (Emphasis added.) See also *Bakke*, 438 U.S. at 299 (when decision-making touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear because of his race or ethnic background is precisely tailored to serve a compelling governmental interest); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

by Justice Marshall.<sup>23</sup> This holding of the Tenth Circuit is in error. A "lenient standard, resembling intermediate scrutiny" is not the standard of review for government contracting programs set forth by a majority of the justices in *Fullilove*, nor is it the standard set forth in other decisions of this Court.<sup>24</sup>

Although there is some question regarding whether Chief Justice Burger's opinion was based upon a "strict scrutiny" standard, he clearly required the use of a standard higher than intermediate scrutiny:

We recognize the need for *careful judicial evaluation* to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal.

*Fullilove*, 448 U.S. at 480. (Emphasis added.) Furthermore, Chief Justice Burger wrote:

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<sup>23</sup> "A majority of the *Fullilove* Court agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress." (App. 16, part of footnote 10.)

<sup>24</sup> The concurring opinion authored by Justice Marshall supports an "intermediate scrutiny" standard for the *Fullilove* factual situation because Justice Marshall rejects both "strict scrutiny" and "the minimally rigorous rational-basis standard of review." *Fullilove*, 448 U.S. at 519. The constitutional test is met, wrote Justice Marshall, when the program is "designed to further remedial purposes [which] serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519. But Justice Marshall was joined by only two other Justices, *i.e.* Justice Brennan and Justice Blackmun.

*Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.*

*Fullilove*, 448 U.S. at 491. (Emphasis added.) "Careful judicial evaluation," "narrow tailor[ing]" and "most searching examination" indicate a level of scrutiny much closer to "strict scrutiny" than to "intermediate scrutiny."

Chief Justice Burger articulated a two step analysis for reviewing the Public Works Employment Act (PWEA) program at issue in *Fullilove*. However, there is nothing in that analysis from which to infer that he intended any standard other than strict scrutiny. In fact, just the opposite is true as shown by the language quoted above and by the second step of Chief Justice Burger's analysis:

the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

*Fullilove*, 448 U.S. at 473. (Emphasis in original.)

Thus, the standard of review articulated by Chief Justice Burger in *Fullilove* was not, as interpreted by the Tenth Circuit, "a lenient standard, resembling intermediate scrutiny," but is the "conventional" "strict scrutiny" standard.<sup>25</sup>

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<sup>25</sup> The conclusion that Chief Justice Burger's standard of review is the conventional standard or strict scrutiny is bolstered by the concurring opinion of Justice Powell:

Therefore, the Tenth Circuit's opinion is in error when it holds "[a] majority of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster" and must be reversed. (App. 16, part of footnote 10).

### III. THE DECISION OF THIS COURT IN *METRO BROADCASTING* IS NOT DISPOSITIVE OF THIS CASE.

The Tenth Circuit held that *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990):

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Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

. . . .

[The PWEA] employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a *compelling governmental interest*. (Citing *Bakke*) For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

. . . .

Racial classifications must be assessed under *the most stringent level of review* . . . .  
*Fullilove*, 448 U.S. at 496. (J. Powell, concurring.) (Emphasis added.) "Compelling governmental interest" and "the most stringent level of review" are "strict scrutiny."

put to rest any lingering doubts about the continuing vitality of *Fullilove*: . . . "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

(App. 19.) The Tenth Circuit then concludes:

the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.

(App. 19.)

Although this court held in *Metro Broadcasting* that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments" and that "intermediate scrutiny" is the proper standard of review, *Metro Broadcasting* involved a much different set of facts than the case at bar. *Metro Broadcasting*, 497 U.S. at 565-66. *Metro Broadcasting* involved concerns with the First Amendment:

'[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment,' and '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'

*Metro Broadcasting*, 497 U.S. at 567.

The case at bar does not involve First Amendment concerns in any way. Although the need for "diversity" in certain areas, *i.e.*, broadcasting, police forces, and school

faculties and student bodies, as set forth in *Metro Broadcasting*, may provide "reasons for the classification," none of those situations exist in the case at bar. *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring.) This case involves the erection of guardrails along a 4.7 mile section of national forest highway in an isolated and sparsely-populated region of southwestern Colorado. Moreover, Congress did not identify "diversity" in government contracting as a reason for the racial classifications used in the Federal Construction Procurement Program. See 15 U.S.C. § 631(f)(1). Thus, the holding of this Court in *Metro Broadcasting* is inapplicable to the case at bar.

Furthermore, Justice Stevens' concurring opinion in *Metro Broadcasting* cannot be cited as a basis for weakened scrutiny for programs that award government construction contracts on the basis of race since he demands that the reasons for racial classifications used in such programs be "clearly identified and unquestionably legitimate." *Metro Broadcasting v. FCC*, 497 U.S. at 601, citing his dissenting opinion in *Fullilove*. In his dissenting opinion in *Fullilove*, Justice Stevens wrote "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).<sup>26</sup>

While Justice Stevens listed several situations where race-conscious measures are "unquestionably legitimate,"

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<sup>26</sup> Regarding the SBA, Congress has done neither. It has not "clearly articulate[d] the need and basis for [the] racial classification" and has not "tailor[ed] the classification to its justification." "The Court should not uphold this . . . statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).

the list does not include highway construction or government contracts. *Metro Broadcasting*, 497 U.S. at 601-602.<sup>27</sup> Justice Stevens' decision not to include contracting as an "unquestionably legitimate" race-conscious measure and his dissent in *Fullilove* manifest his views that government contracting requires a different level of scrutiny than, for example, public broadcasting and that congressionally-mandated public works laws are subject to a more rigorous standard of review, *i.e.*, strict scrutiny.

As this Court has held on numerous occasions, strict scrutiny is the traditional standard of review to be applied to race-conscious programs like the one at issue, even if the program is mandated by Congress. The facts of the case at bar are clearly distinguishable from the facts found to require intermediate scrutiny in *Metro Broadcasting*. Since the decision of the Tenth Circuit is contrary to the decisions of this Court regarding the proper standard of review for race-conscious construction contract programs, the decision of the Tenth Circuit must be reversed.

#### IV. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT CONGRESS "CAN ENGAGE MORE FREELY IN AFFIRMATIVE ACTION THAN STATES AND LOCALITIES" IS IN ERROR.

The Tenth Circuit held:

The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more

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<sup>27</sup> That list is "extremely narrow" and includes "broadcast diversity;" "an integrated police force;" "a public school faculty;" and "the student body of a professional school." *Metro Broadcasting*, 497 U.S. at 601-602.

freely in affirmative action than states and localities.

(App. 18.) This holding deviates from the holdings of this Court:

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

*Bolling v. Sharpe*, 347 U.S. at 500.<sup>28</sup>

The holding of the Tenth Circuit with regard to the relationship of *Fullilove*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting* is in error. Since none of the opinions written in *Fullilove* were a plurality, let alone a majority opinion, *Fullilove* cannot be read to overrule existing Supreme Court precedent.

As for *Metro Broadcasting*, its factual situation is clearly distinguishable from, and is not dispositive of, the case now before the Court. More importantly, *Metro Broadcasting* cannot be cited for the proposition that Congress is treated differently by the Constitution than other governmental bodies when a race-conscious construction contract program is at issue. The discussion of Congressional authority in *Croson*, as it related to the *Fullilove* decision, addressed Congressional power under § 5 of the Fourteenth Amendment, which is not at issue in this case.

<sup>28</sup> "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of racial classifications." *Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J. dissenting).

*Croson*, 488 U.S. at 490.<sup>29</sup> No decisions of this Court support the holding of the Tenth Circuit that "the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities" when a race-conscious construction program is at issue. Although Congress may have greater remedial authority, the constitutional standard for reviewing a construction contract program authorized by Congress or states is the same. The decision of the Tenth Circuit is in conflict with *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 275 (1986), *Croson*, *Bolling v. Sharpe*, and *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d 511, 526 (1993) and must be reversed.

#### V. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM FAILS STRICT SCRUTINY AND IS UNCONSTITUTIONAL.

As indicated above, strict scrutiny is the standard of review that must be applied in this case. For the Federal Construction Procurement Program to survive strict scrutiny it must be "narrowly tailored" to a "compelling governmental interest." See *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d 511, 526.

<sup>29</sup> Congress' § 5 authority is not implicated in this case since it involves a federal program implemented by a federal agency and since no state or local government is involved.

**A. THERE IS NO "COMPELLING GOVERNMENTAL INTEREST" THAT JUSTIFIES THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM CHALLENGED IN THIS ACTION.**

This Court has held that an attempt to remedy past discrimination is a "compelling governmental interest." Yet, Congress did not attempt to identify the discrimination to be remedied by this Federal Construction Procurement Program. As a result, the Federal Construction Procurement Program cannot survive strict scrutiny.

The record contains no evidence of any pattern or practice of discrimination against minorities in federal procurement activities. The racial preference codified at 15 U.S.C. § 644(g) appears as part of the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988).<sup>30</sup> This Act, which amended the SBA, focused almost exclusively on the section 8(a) set-aside program, 15 U.S.C. § 637(a). It contained no findings identifying the discrimination to be remedied by the provision being challenged in this case; indeed, it contained no findings identifying any discrimination at all. The legislative history is of no use in filling this gap; it, too, contains no evidence of a pattern or practice of discrimination against minorities in government procurement activities.<sup>31</sup>

<sup>30</sup> The racial preference established by § 106 of STURAA was in effect for more than eleven years. STURAA was in force from 1987 through 1993, but the Surface Transportation Assistance Act of 1982, in which the language of § 105(f) was almost identical to the language of § 106(c) of STURAA, was in effect from 1982 to 1987. Pub. L. 97-424, 96 Stat. 2100.

<sup>31</sup> The legislative reports which accompanied Pub. L. 100-656 are reprinted at 1988 U.S. Code Cong. & Admin. News 5401 et seq.

At the trial court level, Respondents argued that "[i]n passing Public Law 95-507,<sup>32</sup> Congress made specific findings with respect to the utilization of socially and economically disadvantaged business concerns, as well as findings indicating the need to promote their participation in federal procurement." However, these "findings," which are codified at 15 U.S.C. § 631(f)(1) and set forth on pages 11-12, do not meet the Court's requirement for demonstration of a "compelling governmental interest."

The "findings" contain a statement of the reasons which caused Congress to adopt the racial preference provisions of the Federal Construction Procurement Program. However, they contain no evidence of a pattern or practice of discrimination in government contracting against members of "disadvantaged" ethnic groups. Rather, the "findings" merely assert what they purport to prove. Conclusory statements such as these "are of little probative value in establishing identified discrimination" in federal procurement. *Croson*, 488 U.S. at 501. Furthermore, the legislative history for Public Law 95-507 contains no empirical support for these "findings".<sup>33</sup> Therefore, these "findings" cannot be considered of value in determining whether the government has met its heavy burden of providing "extraordinary justification" for the racial classification in this case. (See *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d 511, 526, citing *Brown v. Board of Education*, "A

<sup>32</sup> Pub. L. 95-507, styled as the Small Business Investment Act of 1978, also amended the SBA.

<sup>33</sup> The legislative reports which accompanied Pub. L. 95-507 are reprinted at 1978 U.S. Code Cong. & Admin. News 3835 et seq.

racial classification, regardless of its motivation, is presumptively invalid and can be upheld only upon an *extraordinary justification*." (Emphasis added.)

In sum, Congress did not have persuasive evidence of a pattern or practice of intentional discrimination either by federal agencies or their prime construction contractors. Without such evidence of prior discrimination there is no "compelling governmental interest" that justifies the use of race in government decision-making. This shortcoming renders the Federal Construction Procurement Program constitutionally deficient under *Fullilove*, 448 U.S. at 480, as well as *Wygant*, 476 U.S. at 274 and *Croson*, 488 U.S. at 505. "[T]he statute [is] invalid because, on its face, it could not be explained on grounds other than race." *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d at 527.

Moreover, even if Congress made findings with the specificity this Court demands, and it did not, those findings were made more than a decade ago. If there was a pattern or practice of racial discrimination – and Respondents have testified there was not – the defect was cured long ago. Thus, what is present here is a remedy that is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

Respondents admit that the CFLHD has never discriminated on the basis of race.<sup>34</sup> Respondents take the position that "societal discrimination" is sufficient to justify the use of a race-conscious program by that agency in

<sup>34</sup> In a deposition taken on March 19, 1991, Mr. Jerry Budwig, Division Engineer of the CFLHD testified "I would say that there has not been," when asked if there had ever been a case in which the CFLHD discriminated against a contractor or subcontractor on the basis of race. (App. 45-46.)

Colorado. However, this Court has held that "societal discrimination" is not enough: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification." *Wygant*, 476 U.S. at 274. The reason is simple, "it is almost impossible to assess whether [this] plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 498. Thus, "societal discrimination" cited by Congress does not provide sufficient constitutional authority to justify the use of a race-conscious program by federal officials in Colorado.

Despite the requirement of this Court for a showing of a "compelling governmental interest" before the use of race as a basis for governmental decision making, the United States Court of Appeals for the Tenth Circuit held that the "significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises" satisfies this Court's requirement. (App. 23.) (Emphasis added.) However, "significant governmental purpose" is not what this Court requires. This Court requires a "compelling governmental interest." No showing of a "compelling governmental interest" has ever been made by Congress for the race-conscious Federal Construction Procurement Program.

[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'

*Croson*, 488 U.S. at 498. As a result, the decision of the United States Court of Appeals for the Tenth Circuit must be reversed.

**B. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NOT "NARROWLY TAILORED."**

The second prong of the strict scrutiny test is "narrow tailoring." That is, the race-conscious program must be "narrowly tailored" to meet the "compelling governmental interest" identified. *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L. Ed. 2d at 526.

Yet, the Federal Construction Procurement Program is not narrowly tailored. Narrow tailoring requires that the race-conscious remedy "not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 523 (Powell, concurring). Moreover, the Federal Construction Procurement Program must be "limited in extent and duration." *Fullilove*, 448 U.S. at 489. See also *Croson*, 488 U.S. at 498.

In finding the PWEA program challenged in *Fullilove* constitutional, Chief Justice Burger focused on the fact that the PWEA was "a short-term measure to alleviate the problem of national unemployment." *Fullilove*, 448 U.S. at 457.<sup>35</sup> Without a statutory provision establishing a limited time period for the use of the race-conscious remedy, the program cannot be said to be narrowly tailored. "Such

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<sup>35</sup> "The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration. . . ." *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.) "The . . . set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 513 (Concurring opinion of Powell, J).

findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Croson*, 488 U.S. at 510. (Emphasis added.)

The Federal Construction Procurement Program challenged here has been in place for more than thirteen years and shows no sign of ending in the foreseeable future.<sup>36</sup> (R. 10th Cir. # 11, Aplt. App. 326-327.) The law contains no automatic sunset provision and there is no reason to believe that the matter will be revisited by Congress in the near future, contrary to the view of the Tenth Circuit:

[T]he SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."

(App. 23.) The Federal Construction Procurement Program is not a "short term measure" like the statute held by this Court in *Fullilove* to pass constitutional muster. *Fullilove*, 448 U.S. at 457. Nor is the Federal Construction Procurement Program supported by findings sufficient to "assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter," as required by *Croson*. *Croson*, 488 U.S. at 520. Here, without congressional action to repeal or amend it, the program will go on forever.

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<sup>36</sup> Mr. Budwig: "I'm not aware that [the Government's DBE program's] end is in sight." App. at 46-47. Not only does this program appear to be here to stay, but it represents hundreds of millions of federal dollars awarded solely on the basis of race.

A second aspect of narrow tailoring is that the program must be designed to remedy clearly identifiable discrimination. Yet, since Congress failed to identify the discrimination this program seeks to remedy, it suffers from the same deficiency Justice O'Connor identified in *Croson*:

[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.

*Croson*, 488 U.S. at 498.

"Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307. See also *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) ("[I]f the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, [it] violates the equal protection component in the Due Process Clause of the Fifth Amendment.")<sup>37</sup>

Yet, "preferring members of one group for no other reason than race" is precisely what Congress did in the Federal Construction Procurement Program. The Federal Construction Procurement Program directs federal agencies to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). "Maximum

<sup>37</sup> Although this precept has never been the subject of a majority opinion, Adarand submits that this is because the precept is so readily apparent that it has never needed express statement.

practicable" has no reasonable limits. There is a limit to the persons who have suffered from discrimination, therefore, on its face, this near limitless preference cannot be tied to any legitimate remedial objective. Indeed, the goal's requirement has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275 (1986). Instead, it is a race-conscious program that "prefer[s] one racial or ethnic group over another." *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) This Congress cannot do.

Such an objective is invidious under any reading of the law. It sweeps far beyond the legitimate scope of race-conscious governmental action. Certainly, such a statute cannot be said to be "narrowly tailored" to a compelling governmental interest.

In sum, the race-conscious Federal Construction Procurement Program violates both prongs of the strict scrutiny standard. These violations render it unconstitutional.

## VI. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS UNCONSTITUTIONAL EVEN UNDER INTERMEDIATE SCRUTINY.

Respondents argue that intermediate scrutiny should be applied in this case. However, this argument suffers from two fatal flaws. First, as indicated above, it is simply incorrect; strict scrutiny is the proper standard of review for all race-conscious government construction contracting programs regardless of whether Congress has mandated the action. Second, the race-conscious Federal Construction Procurement Program is unconstitutional even under this relaxed standard of review.

Intermediate scrutiny requires that a statute be "related substantially" to the achievement of an "important public purpose." *Metro Broadcasting v. FCC*, 497 U.S. at 565. The desire to remedy past racial discrimination is unquestionably an important governmental purpose. Thus, the question in this case is whether the Federal Construction Procurement Program is "substantially related" to the achievement of this purpose.

The first step in the use of intermediate scrutiny is whether Congress possessed an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement Program have been subjected to racial discrimination. The quantum of evidence required to make this showing is not as high as under strict scrutiny.

However, the burden of persuasion remains on the proponent of the challenged classification. *Heckler v. Mathews*, 465 U.S. 728, 744 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Furthermore, conclusory assertions are not enough to carry this burden. *Lamprecht v. FCC*, 958 F. 2d 382, 393 (D.C. Cir. 1992), quoting *Craig v. Boren*, 429 U.S. 190, 208-209 (1976). Rather, the claim that a statute will substantially advance an important purpose must "at the very least be supported by meaningful evidence." *Lamprecht v. FCC*, 958 F. 2d at 393. Indeed, it is "beyond doubt" that under intermediate scrutiny the proponent of the challenged classification must show that this assertion "actually comports with fact." *Id.* at 394, n. 3, quoting *Craig v. Boren*, 429 U.S. 190, 199 (1976).

The question then becomes: Did Congress possess an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement

Program have been subjected to racial discrimination? The answer is: Congress did not have any evidence of a pattern or practice of discrimination, let alone "meaningful" evidence, identifying a pattern or practice of discrimination in federal construction contracting. Congress did make several "findings" regarding discrimination. See 15 U.S.C. § 631(f)(1), quoted at pages 11-12. However, these "findings" were not supported by any empirical fact-finding, nor were they shown to "actually comport[] with fact." *Lamprecht*, 958 F. 2d at 394, n. 3, quoting *Craig v. Boren*, 429 U.S. at 199. Instead, the "findings" merely assert what they purport to prove. Clearly, these findings do not and cannot show that the members of each and every ethnic group singled out for preferential treatment by the Federal Construction Procurement Program actually have suffered from, and continue to suffer from, the effects of racial discrimination.

There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry . . . suggests that the city's purpose was not in fact to remedy past discrimination.

*Croson*, 488 U.S. at 506. (Emphasis in original.)<sup>38</sup>

<sup>38</sup> Although the *Croson* Court was applying strict scrutiny, this passage is cited as an example of over-inclusiveness which occurs from an assumption that all minorities have suffered from discrimination in the construction industry.

The second step in the inquiry is whether the relationship between the race-conscious provisions of the Federal Construction Procurement Program and the objective of remedying identified discrimination against members of now-favored ethnic groups is sufficiently precise. Once again, this inquiry is somewhat looser than under strict scrutiny. However, the fit between the objective to be reached and the means selected for reaching that objective must remain tight enough to alleviate substantially the identified disadvantages. *Lamprecht v. FCC*, 958 F. 2d at 393. Furthermore, any substantial overbreadth in the chosen remedy renders the remedy unconstitutional. This is the very essence of "substantial basis" review.

The violation, by the Federal Construction Procurement Program, of the second step of intermediate scrutiny is even more clear. The race-conscious provision of the Federal Construction Procurement Program directs each federal agency to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). The near limitless preference of the race-conscious Federal Construction Procurement Program cannot be tied to any legitimate remedial objective. Indeed, it has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275. Thus, this statutory provision sweeps so far beyond any legitimate remedial goal that not only is it impossible to conclude that it is "substantially tailored" to a remedial objective, but it is apparent that its only possible function is to increase the amount of business awarded to minority-owned firms. This is "discrimination for its own sake," which is the very essence of a constitutional violation. *Bakke*, 438 U.S. at 305.

As was the case with strict scrutiny, this discussion of legal standards could be extended considerably, but there is no need to do so, because the race-conscious Federal Construction Procurement Program does not even come close to satisfying either prong of intermediate scrutiny.

Of course, the judiciary may grant some decisions of Congress the respect due a co-equal branch of the federal government. *Metro Broadcasting*, 497 U.S. at 569. Nonetheless, the courts "are still obliged in the end to review the government's policy – both the judgment of law that the policy is constitutional and the findings of fact that underlie it." *Lamprecht v. FCC*, 958 F. 2d at 391 (emphasis in original). Even more importantly, this Court has held that it must not defer to the judgment of Congress on matters involving suspect classifications:

[W]e do not defer to the judgment of the Congress . . . on a constitutional question, and would not hesitate to invoke the Constitution should we determine that [Congress] has not fulfilled its task with appropriate sensitivity to equal protection principles.

*Metro Broadcasting*, 497 U.S. at 569 (citation omitted).<sup>39</sup> This Court must rule on the constitutionality of the race-conscious Federal Construction Procurement Program despite its adoption by Congress.

<sup>39</sup> The Tenth Circuit recognized this principle. "In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the 'great weight' given to the decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted)." (App. 22.)

In the instant case, the facts do not support the claim that the race-conscious Federal Construction Procurement Program is substantially related to the important objective of remedying past discrimination. As a result, this program should be stricken as unconstitutional even if intermediate scrutiny is the appropriate standard of review.

**VII. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION.**

Respondents assert that the race-conscious Federal Construction Procurement Program is constitutional because the SCC provision "operates as a carrot rather than a stick."<sup>40</sup> Respondents argue that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the U.S. Government.

Private discrimination is "evil:" "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." *Croson*, 488 U.S. at 492. Respondents' attempt to hide behind the prime contractor, asserting that it is he and not the federal government that is discriminating on the basis of race, is an artifice and must be rejected. Since federal funds provide the financial inducement to discriminate in accordance with federal regulations, the discrimination is being done by the federal government. Government financing of private discrimination is "evil" and no less "odious to a free people whose

<sup>40</sup> Opp. to Pet. 18.

institutions are founded upon the doctrine of equality" since it is direct discrimination by the government itself. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d at 526.

**VIII. THE CFLHD, WHEN EXCEEDING THE GOALS ADOPTED BY CONGRESS, MUST CONDUCT THE INQUIRY REQUIRED BY CROSON.**

The CFLHD, and not Congress, made the decision to set aside an additional 7 to 10 percent of its contracts for DBEs.<sup>41</sup> That decision in and of itself is also subject to strict scrutiny. Given the suspect nature of racial classifications, "searching judicial inquiry" is necessary to determine what classifications are remedial and "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw v. Reno*, 509 U.S. \_\_\_, 125 L.Ed.2d 511, 526, citing *Croson*.

The SBA provides, in pertinent part:

Notwithstanding the government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

<sup>41</sup> Congress set the level for small disadvantaged business participation at five (5) percent. 15 U.S.C. § 644(g)(1). The CFLHD has established a goal of between 12 and 15 percent. Thus, the additional 7 to 10 percent is the result of a decision by the CFLHD.

15 U.S.C. § 644(g). Congress set the goal at five percent, therefore a goal above five percent does not and cannot reflect Congressional judgment that the goal is constitutionally legitimate. It is therefore up to the CLFHD to identify and to set forth the factual justification for the goal that CLFHD has adopted and to do so with sufficient specificity to meet the requirements of the Constitution, as required by this Court in *Croson*, 488 U.S. 469. Clearly, the CFLHD did not satisfy the requirements of strict scrutiny before implementing its set-aside program.

Under *Croson*, this Court requires that, in order to implement a race-based remedial program, the CFLHD must show a "strong basis in evidence" for its conclusion that race-based action was justified. *Croson*, 488 U.S. at 500. In making this showing, the CLFHD cannot rely on generalized congressional findings of nationwide discrimination: "If all a [governmental entity] need do is find a Congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504. Instead, the CFLHD must identify the discrimination it seeks to remedy "with some specificity" before it can implement race-conscious relief. *Id.*

In *Croson* this Court held that it was "almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. That very deficiency exists here since the CFLHD failed to set forth any identified discrimination

that provided the factual basis for its 12 to 15 percent race-conscious program.<sup>42</sup>

In order to be considered "narrowly tailored" under *Croson* the benefits of the provision had to be limited to members of ethnic groups who have actually suffered from a pattern of identified state-sponsored discrimination. *Croson*, 488 U.S. at 506. However, the benefits offered by the CLFHD's decision to set aside an additional 7 to 10 percent of its contracts are available to members of numerous minority groups.<sup>43</sup> Not only is there no evidence that members of these groups have suffered from racial discrimination at the hands of the CFLHD, but even if members of one group have been victimized, there is no evidence that members of other groups have similarly suffered.

## CONCLUSION

Congress has adopted a race-conscious program that must be reviewed by this Court through the application of "strict scrutiny" so as to ensure the program's compliance with the Constitution's guarantee of equal protection. The application of strict scrutiny reveals that Congress' race-conscious program is not "narrowly tailored" to serve a "compelling governmental interest," since it seeks to redress historic, general, societal discrimination and not

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<sup>42</sup> In fact, as noted above, CLFHD officials have testified that there is no history of racial discrimination in the CFLHD. (R. 10th Cir. # 11, Aplt. App. 339 & 348.)

<sup>43</sup> See footnote 9 for a partial list of the "other minorities" included.

specific acts of discrimination on the basis of race. As a result, the race-conscious Federal Construction Procurement Program, and its application to Adarand, so as to prevent it from competing on an equal basis with other guardrail subcontractors, must be declared unconstitutional and set aside.

**Respectfully Submitted,**

**WILLIAM PERRY PENDLEY\***

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***Attorneys for Petitioner***



the Commission alerted the Court to the pendency of that case in its motion for expedited consideration. Motion at 10 n.7. The Commission proposed sensible procedures to deal with any pertinent decision the Supreme Court might make in that case, suggesting that the parties be required to file supplemental briefs if that would be useful in this case. The procedures proposed in the Commission's motion would serve the interests of the parties and the public in prompt resolution of this case while allowing appropriate consideration of any intervening Supreme Court decision in Adarand that might be pertinent.<sup>3</sup>

2. Although TEC now asserts that its request for a stay is narrow (Opposition, at 7), that assertion is neither correct nor relevant to the request for expedited consideration. TEC did ask the Court for a stay that would permit it to participate in the auction; and it did propose that any license it obtains be subject to rescission if the FCC prevails. But TEC also asked, as part of its purportedly "narrow" stay request, that the Court stay those portions of the FCC rules that allegedly "discriminate against TEC's rural telephone companies on the basis of race and gender." Emergency Motion for Stay, at 1. Apparently realizing

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<sup>3</sup> TEC's argument ignores the fact that the constitutional issue is not the only issue for the Court in this case. Indeed, the constitutional issue was fifth in TEC's list of reasons why the Commission's order is likely to be set aside on the merits. Emergency Motion for Stay, at 5. And it was not even mentioned in TEC's motion asking the Commission for a stay. The Commission believes that expedited briefing in this case is necessary to resolve all uncertainty regarding the auction procedures as promptly as possible.

that its "narrow" request would put the Court in the uncomfortable position of parsing the Commission's auction procedures and carving out some provisions while leaving others, TEC asked in the alternative for a stay of the entire auction.

In its opposition to the stay motion (at 16-18), the Commission pointed out that either a narrow stay or a broad one would disserve the public interest. A stay allowing TEC (and others foreclosed by the rules) to participate in the auction while leaving the merits arguments unresolved would distort the auction by creating uncertainty among the designated entities as to the rules of the game. Inevitably, their ability to obtain financing, decisions on participating at all, and bidding strategies would be affected by even the "narrow" stay TEC seeks.<sup>4</sup> A stay of the entire auction, as we showed, might permanently harm the ability of auction winners ever to compete effectively, and thus might affect both the value of the licenses and the amounts received by the Treasury from the auctions. Although TEC is willing to endure some delay, the other potential bidders are anxious to proceed with the auction, as shown by their letters in support of our motion for expedition.<sup>5</sup>

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<sup>4</sup> For example, a designated entity that would participate in the auction and bid on Mississippi licenses in TEC's absence would need to consider whether it could outbid TEC. If TEC is in the auction, the designated entity might be unable to obtain financing or might change its strategy and bid on other licenses.

<sup>5</sup> TEC argues that the FCC can minimize the costs of delaying the auction of C block licenses by proceeding with the auction of licenses in the D, E, and F blocks. But holders of D, E, and F block licenses are unlikely to become direct competitors

3. The pertinent consideration here is that the Commission's proposal for expedited briefing is totally responsive to TEC's expressed concern that its challenges to the FCC's auction procedures may be resolved too late to have any effect on TEC's ability to participate. The FCC believes that TEC's challenges lack merit. *Opposition to Stay*, at 5-16. But its request for expedited briefing, which was prompted by TEC's filing of the stay motion, offers adequate assurances of a timely decision on the merits without either the distortion or the costly delay that a grant of TEC's motion inevitably would produce.

This Court's procedures recognize expedited treatment of cases on the merits as a preferred alternative to interim relief in appropriate circumstances. D.C. Circuit Handbook of Practices and Procedures, at 70-71. Thus, the Court may expedite cases "in which the public generally, or in which persons not before the Court, have an interest in prompt disposition." *Id.*<sup>6</sup> The

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of A and B block license holders or existing cellular providers because licenses in the D, E, and F blocks entitle holders to the use of only 10 MHz of spectrum. TEC's argument also ignores the fact that, under the Commission's rules, A and B block license holders may bid in the D and E blocks, though not in the C block (or the F block, also reserved for smaller businesses). As a result, D and E block licenses are unlikely to produce the beneficial competition that C block licenses will provide, assuming C block bidders receive their licenses in time to become effective competitors.

<sup>6</sup> The Court on its own motion often will expedite the briefing of a case in an order denying a motion for stay. *See, e.g., American Tel. & Tel. Co. v. FCC*, D.C. Circuit No. 93-1590 (Order of Nov. 15, 1993).

Commission framed its request for expedition in precisely these terms, while showing in addition that expedition was responsive to TEC's legitimate concerns that relief might come too late. Moreover, expedition (and not a stay) is particularly appropriate where Congress has directed the Commission to avoid "administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

For the reasons stated here and in our motion, the Court should issue an order adopting the briefing schedule proposed in the FCC's motion and should hear argument as early as its schedule permits.

Respectfully submitted,

William E. Kennard  
General Counsel

Christopher J. Wright  
Deputy General Counsel

John E. Ingle  
Deputy Associate General Counsel

James M. Carr  
Counsel

Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740

March 1, 1995



## Public Papers of the Presidents

FOCUS

The President: When I was a boy I went to school with a man named Richard Kuklinski. [Laughter]

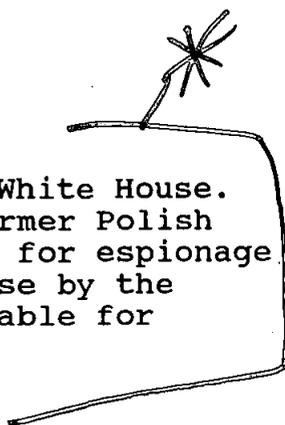
Q. Oh, really? This can help him.

The President. I wonder if he was related to this man.

Q. I hope it will help him as well.

The President. Thank you.

NOTE: The interview began at 6:07 p.m. in the Oval Office at the White House. In the interview, the President referred to Ryshard Kuklinski, former Polish military officer, now a U.S. citizen, who would face imprisonment for espionage if he returned to Poland. This interview was embargoed for release by the Office of the Press Secretary until July 5. A tape was not available for verification of the content of this interview.



LANGUAGE: ENGLISH

LOAD-DATE-MDC: August 05, 1994

## Polish-American Radio and TV

Q. Mr. President, I would like to ask a question, a domestic, because I represent the only Polish television outside of Warsaw, daily television outside of Warsaw. There are 12 million Polish-Americans living in this country. Do you foresee any incentives for businesses to produce radio and television programming on the national level?

The President. I don't understand the question.

Q. This is a chance to grow, for the Polish -- I'm talking about ethnic groups like Polish-Americans, Latvians, Lithuanians, to be able to have programming on the national level. It means for the businesses to have some incentive to -- tax deductions -- like other ethnic minorities have. I mean, the Polish-Americans are not regarded as ethnic but --

The President. Oh, I see. You mean like the minority requirements under the Federal Communications Commission to have African-Americans own television stations or radio stations.

Q. Yes, yes. we are ethnic, but we are not ethnic.

The President. I see. This is the first time anyone ever asked me that. Why don't you -- I just never thought about it. Why don't you put together a letter to me, write me a letter stating what you think, how you think we should do it. In other words, what should be the standard? Who should be included? How should we involve other minority groups or ethnic groups in this? I would be happy to consider it; it's just no one ever asked me before.

I do believe -- let me just say, for whatever it's worth, I think that there is a difference here, though. Because under the law, the idea was to get more African-American ownership of general audience radio or general audience television. And I don't think that applies to, let's say, African-American newspapers or African-American -- at least printed material. It may or may not apply to African-Americans' radio stations.

But I will look into it. If you will write me a letter about it, I'll look into it, see exactly how it works and whether we should apply or consider applying it to others. It's really a matter of law; the Congress, I think would have to change the law. But they might be willing to do that.

Q. I traveled to USIA, to the WORLDNET satellite station, and I talked to the people there. And they feel that there is a need for joint business and government actions. I don't know how you also perceive the situation, possibility of changing this

The President. I basically think that diversified ethnic press is a good thing for America. We have so many different people -- if you look, Los Angeles County has members of 150 different racial and ethnic groups alone.

Q. And Chicago, 163.

NATO and the Partnership For Peace

Q. I hope I'll be excused for my trembling voice. Mr. President, Polish-Americans in the U.S., and all Poles in Poland as well, with great anxiety are observing a development of the conception of so-called strategic agreement between Washington and Moscow, because it would carry away Poland's acceptance to the NATO. Mr. President, what is your point of view toward Poland's -- [inaudible] -- to become a full member of North Atlantic Treaty?

The President. Well, I will answer it the way I answered the first question. We first of all believe -- I believe NATO should be and will be expanded. In order to do that, all the members of NATO, not just the United States, must decide on when and how that will occur. From my perspective, our relationship with Russia will not and must not include the proposition that any country should have veto over any other country's membership with NATO or that something bad has to happen in Russia before we expand NATO. I just -- I think that is not something the Polish people should be concerned about.

Instead, what I think should be emphasized is the readiness of the Polish military forces, the success of these upcoming military exercises. We are doing military exercises with Poland and NATO in Poland for the first time this fall, and it will be the first exercises of the Partnership For Peace. So I wouldn't be too worried about that if I were the people of Poland.

I understand the historic concerns; I understand them very well. But the United States has not made an agreement to give any country veto power over membership in NATO, nor has NATO made a decision that it will not expand until there is some bad development in Central or Eastern Europe.

So I think that in the ordinary course of time, NATO will expand, Poland will be eligible. I think it will be fine. And in the meantime, the best way to build security is to make the most of this Partnership For Peace because, in order to get into the Partnership For Peace, every country must commit to respect every other country's borders and because, once in, we then began to do joint military exercises together, which will build the confidence of all the NATO members in expanding membership.

Q. Mr. President, I am wondering, couldn't we start to refer to Poland as Central European country and lose the Eastern European connotation? Poland was always the middle of Europe, never the east.

The President. I think of Poland as Central Europe. I agree with that. And I think Poland should be characterized as Central Europe. But when I mentioned the Partnership For Peace, there are a number of Eastern European countries that are also in the Partnership For Peace. But I agree with you, it should be considered Central Europe.

Q. Thank you.

#### Purchase of U.S. Military Equipment

Q. Mr. President, you mentioned the possible exercises, military exercises, in Poland. There are in Congress, the Senate right now, I think, five amendments concerning various aspects of the Polish situation. And some of them are opposed bylagain, I repeat -- opposed by the Department of State. Particularly, we are interested in the fact that Poland is trying to get the

permission to purchase or lease military equipment from the United States. And it is our understanding that the State Department is rather opposing of this --

The President. We support the transfer of certain military equipment to Poland. The question is -- and we consider Poland an ally and a friend. We have no problem there. The question is we have some general rules which we apply to everyone about certain kinds of equipment that we will not sell. And the issue here is if, as I understand the issue, if we depart from the rules we have for everyone for Poland, then will we be forced to change our policy in general because people will say, "Well, yes, Poland is your friend and Poland is a democracy, but so are we, so you must include us in anything you do for them."

So the State Department, when they issue a letter, has to consider not just Poland but what will our policy be when someone else comes along and says, "We have been also a friend, and we are also a democracy, and give us the same treatment." That's really what is at stake here. We have no problems with transfers of a lot of military equipment to Poland, but we have to be careful if we get into something that we don't do anywhere else, how shall we describe the difference in the Polish situation and others.

#### Immigration

Q. Mr. President, I ask a question about a thing that is not only of Polish concern here but of all immigrants in the United States. We are kind of noticing a toughening of the policy towards immigrants or preparations to this kind of a process. How do you perceive that matter? Will you support any toughening of the U.S. policy towards immigrants, no matter legal or illegal?

The President. Well, first of all, I support a vigorous immigration policy. This is a nation of immigrants. Only the American Indians are not immigrants. And some of them actually came across from Russia millions of years ago when we were tied through Alaska to Russia. So we are all immigrants.

The only thing that I have supported is stronger requirements on illegal immigration because the number of illegal immigrants is largely concentrated in a small number of States, in California and Texas and New York, to some extent, New Jersey. And where there is a large legal immigrant population, the costs of dealing with that largely fall on a few States. And the feelings against immigrants in general tend to get very high.

For example, California is one of the most diverse States -- ethnically diverse States in America. And yet, now there is a great feeling there among some people that we ought to shut off immigration. Why? Because they have a high unemployment rate and a lot of illegal immigrants. So I have tried to help California to strengthen its border patrol and to do some other things which will reduce the flow of illegal immigrants into California. But I do that because I do not want any further restrictions on legal immigration.

And I think our country has been greatly strengthened by immigrants. And I think that all we should want is a set of rules that everyone follows for how we expand our population. But I have no plans, for example, to try to limit the number of legal immigrants from Central Europe or from any other place in the world.

## Russian Troop Withdrawals

Q. Last year at your Vancouver summit with President Yeltsin, you promised that the U.S. would provide \$ 6 million to build 450 housing units in Russia for officers withdrawn from the Baltic States. There are reports that much of these funds administered by the U.S. AID are not being utilized to benefit the withdrawing officers. In view of the fact that the U.S. will be financing several additional thousand housing units for these officers, how will the U.S. monitor that these apartments will actually be given to officers withdrawn from the Baltic countries?

The President. What are they saying, that the --

Q. That the money is actually being allocated in different --

The President. To people who are not officers or to something other than houses?

Q. Right. Both, actually.

The President. Well, let me say this. We are trying to get -- right now we are trying to get a better oversight on all of our Russian aid programs in general. But I would say it would not be in the best interest of the Government of Russia for this money not to be spent in the appropriate way. Because after all -- if we make a commitment and we deliver the money and they withdraw the soldiers, which they have to do -- it's part of the deal -- then I would think it would not be in their interest not to build the houses for the soldiers, because the whole idea is to try to stabilize the domestic political situation by doing the fight thing by the soldiers who are coming home and giving them some way to make a decent life for themselves.

So I think if this has occurred, it is not a good thing for the Russian Government and for Russian society. It's not in their interest. But we are trying to improve our oversight of all these programs because, as you pointed out, we have actually committed to spend even more money on housing to get the withdrawal done in a fast way.

## President's Visit to Poland

Q. Mr. President what is your main objective when you visit Poland?

The President. My main objective is to reaffirm the strong ties between the United States and Poland and to reaffirm our commitment here in the United States to helping Poland achieve a successful economic transition--the Polish economy, as you know, grew by 4 percent last year, more than any other economy in Europe -- and to do so with some help with easing the social tensions caused by the transition. And I have some ideas and some suggestions that I wish to share with President Walesa and then perhaps in the Polish Parliament, too. You know I'm going to speak in the Polish Parliament. I must say I'm very excited about it. It's a great honor. I'm so excited; the idea that I will be able to address the Parliament, that I will be able to visit some monuments of places I've only read about or dreamed of, it's a great thing not only for me as President but just for me as a citizen and for my wife. We're very excited about that.

We're also, "I might say, very excited about going to the Baltics. I grew up in a little town in Arkansas that had a substantial Lithuanian population. So I grew up knowing about the problems of the Baltic nations. Interestingly enough, we had a lot of people from Central and Eastern Europe, a lot of people from the Czech Republic in my hometown in Arkansas who came down from Chicago, most of them came from Chicago, and moved to my State because it was a little warmer but still it had four seasons. So I'm very excited about it.

#### Poland-U.S. Relations

Q. Your decision, Mr. President, to consult Mid and East European issues with American ethnic groups from this region was widely welcomed and accepted with great appreciation. I am talking about this meeting in Milwaukee, Wisconsin, you couldn't unfortunately attend. Mr. President, will the Department of State continue this kind of link with ethnic Americans?

The President. Yes. We will do a lot of it right here out of the White House also. I have had -- I am taking about a dozen Polish-American leaders to Poland with me. I have had leaders of various ethnic groups into the White House to meet with me personally, as well as the Vice President's trip to Milwaukee. And we will continue to do this as long as I am President. I think it's very, very important. It helps us to make good policies as well.

You know, for example, the United States is today the biggest foreign investor in Poland. I think about 44 percent of all the foreign investment in Poland comes from the U.S. The Polish Enterprise Fund has been responsible for about 10,000 new jobs in Poland. And I want this to grow. And I think it has to grow through the involvement of citizens, not just government officials. So I will do more and more of that.

Q. You have my thoughts, sir.

The President. Thank you very much.

Q. Thank you.

Ryshard Kuklinski

The President. Thank you all for coming. I will get on this. I did not know of this case; I will get right on it.

Q. Sir, this is not from me, now. I would like to make a statement here that this letter is not only from the Alliance of the Polish Clubs in Chicago, this really reflects widespread attitude of Poles and concern of Poles about Mr. Kuklinski. And we kind of feel that the United States has somewhat an obligation to do something about it because Mr. Kuklinski helped a lot, contributed so much to the cause of the world peace and defeating the Communist system. And now he cannot even go back to his own country that he loves and he wants to go.

The President. I'll get on it.

Q. Thank you, sir.

# Federal Communications Commission TELECOPIER COVER SHEET

DATE: March 6, 1995  
TO: Sam Olchyk  
Senate Finance Committee  
PHONE: 202/224-4515  
FAX: 202/224-5920  
FROM: Abbie Baynes, Esq.  
Office of General Counsel  
PHONE: 202/418-1700  
No. Pages: 6

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Attached is a summary of tax certificate transactions prepared by our Office of Communications Business Opportunities. Note that the numbers reflect those provided to the House and will be updated to be consistent with those in Bill Kennard's Senate testimony.

Please call me at the number shown above if I can provide additional information.

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

February 28, 1995

**BY TELECOPIER**

Ken Kies  
Chief of Staff  
Joint Committee on Taxation  
United States Congress  
1015 Longworth Building  
Washington, DC 20515-6453

Dear Mr. ~~Kies~~ *Ken*,

In your letter of February 23, 1995, you requested information concerning the Federal Communications Commission's practice in issuing tax certificates. Specifically, you questioned whether the Commission's usual practice is to issue a tax certificate before or after the final closing of a transaction occurs.

In most instances, transactions require the issuance of a tax certificate as a condition to closing. Thus, in order for closing to occur, the buyer must present the tax certificate on the closing date. In these cases the Commission's usual practice is to require the parties to present some evidence of their intent to purchase (for example, a signed purchase agreement) before the tax certificate is issued. The tax certificate would then be issued prior to closing, provided that the transaction complies with the tax certificate policy. If, for any reason, the proposed transaction did not close, the tax certificate would have no value because no transfer of control would have occurred.

As you requested, we have attached an updated list of pending tax certificate applications.

Sincerely,



William E. Kennard  
General Counsel

cc: Donna Steele-Flynn  
Abbie Baynes  
Judith Harris  
Anthony Williams

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

March 7, 1995

**BY TELECOPIER**

Ken Kies  
Chief of Staff  
Joint Committee on Taxation  
United States Congress  
1015 Longworth Building  
Washington, DC 20515-6453

Dear Ken:

Since my testimony before the Subcommittee on Oversight of the House Committee on Ways and Means on January 27, 1995, the Commission staff has continued to search the Commission's tax certificate and ownership files to satisfy requests for information made by the Committee members and staff members of the Joint Committee on Taxation. The numbers of tax certificates provided to the Subcommittee reflected numbers available through our Office of Public Affairs, because we were unable to search all tax certificate files, covering a sixteen year period, in the five working days between the time we learned of the hearing and the hearing itself.

In preparation for today's hearing before the Senate Finance Committee, we have provided the most recent numbers available from our research. I enclose a copy of my testimony before the Senate Finance Committee. To summarize, our research yielded information about 29 additional minority tax certificates issued between 1978 and 1994: 25 in radio, 3 in television, and one in cable. Copies of these certificates, to the extent they are available, have been provided to Alysa McDaniel of your staff.

Sincerely,



William E. Kennard  
General Counsel

cc: Donna Steele-Flynn  
Abbie Baynes  
Judith Harris  
Anthony Williams

## HOUSE CORRESPONDENCE

Minority Ownership Of B/c Facilities  
 Tax Certificate  
 Ownership Minority

Public Notice re policy statement of minority ownership of b/c facilities, issued. In assignment and transfer matters, tax certificates will be granted to the assignors of b/c facilities to parties with significant minority interest. Licensees whose licenses have been designated for revocation hearings encouraged to transfer to minority applicants, i.e. "distress sales."

F.C.C. 78-322

BEFORE THE  
 FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Statement of Policy on Minority Ownership  
 of Broadcasting Facilities

May 25, 1978

One decade ago, as a partial response to the concerns expressed in the *Report of the National Advisory Committee on Civil Disorders* ("The Kerner Report"),<sup>1</sup> the Commission articulated policies and principles which would guide it in its consideration of complaints that its licensees—or those who would be its licensees—had discriminated against minorities in their employment practices.<sup>2</sup> We observed that "we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy."<sup>3</sup>

One year later, July 16, 1969, the Commission adopted rules which, in addition to forbidding discrimination on the basis of race, color, religion or national origin, also required that "equal opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons."<sup>4</sup> To meet this goal, licensees were required to develop a program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice. On May 20, 1970, the Commission adopted rules requiring most of the licensees within its jurisdiction to file annual employment reports and a written equal employment opportunity program with certain application forms.

Just two years ago, we reiterated and clarified our policy on employment discrimination. We emphasized that our rules embodied the concepts of nondiscrimination and affirmative action, observing that:

<sup>1</sup> *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam Books, 1968).

<sup>2</sup> *Petition for Rulemaking to Request Licensees to Show Non-discrimination in Their Employment Practices*, 13 FCC 2d 766 (1968). ("(A) petition or complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it.")

<sup>3</sup> *Id.* at 769.

<sup>4</sup> *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 240 (1969). "Sex" was added as an impermissible basis for discrimination in May, 1970. *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970).

An Affirmative Action Plan is a set of specific and result-oriented procedures which broadcasters must follow to assure that minorities and women are given equal and full consideration for job opportunities.<sup>5</sup>

In adopting the Model EEO Program proposed in 1975, the Commission noted that:

As we have moved with steadily increasing actions to strengthen our rules and policies in the area of nondiscrimination in the employment policies and practices of broadcast station licensees, we have attempted to do so in line with our primary statutory mandate—the regulation of communication by wire and radio in the public interest. . . .

[We have sought to limit our role to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service broadcasting.]<sup>6</sup>

The Supreme Court has spoken favorably of such Commission actions. In *NAACP v FPC*, 425 US 662, 670 n. 7 (1976) the Court observed:

The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. . . . These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.

The Commission has taken action on other fronts as well to assure that the needs, interests and problems of a licensee's community (including minorities within that community) are both ascertained and treated in the programming of the licensee. Under our ascertainment requirements<sup>7</sup> licensees are required to contact community leaders and members of the general public to obtain information about community interests and to present programming responsive to those interests. To aid licensees in these efforts, we have developed a community leader checklist consisting of 20 groupings or institutions which we believe are found in most communities. Reflecting our commitment to the expression of minority viewpoints, we have required that licensees specifically contact minorities in a community as a distinct grouping or institution (among the 20 groupings outlined by the Commission) from which representative leaders are to be drawn. Moreover, the Commission requires that the licensee interview minorities and women within the 19 "non-minority" institutions or groupings which it also expects the licensee to contact as part of its ascertainment procedure.

While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities<sup>8</sup> continue to be inadequately represented in the broadcast media.<sup>9</sup> This situation is detrimental not only to the

<sup>5</sup> *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354, 358 (1975).

<sup>6</sup> *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226, 229-230 (1976).

<sup>7</sup> *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418 (1976).

<sup>8</sup> For purposes of this statement, minorities include those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.

<sup>9</sup> See *Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report* (1978); *U.S. Commission on Civil Rights, Window Dressing on the Set* (1977); See also *The Kerner Report*, supra at 207, 208, 210.

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.

Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

As the Commission's *Minority Ownership Task Force Report* recounts:

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 interests 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.<sup>10</sup>

It is apparent that there is a dearth of minority ownership in the broadcast industry. 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. And, of course, we have long been committed to the concept of diversity of control because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities."<sup>11</sup> What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

Hence, the present lack of minority representation in the ownership of broadcast properties is a concern to us. We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

The United States Court of Appeals for the District of Columbia observed in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971):

Since one very significant aspect of the 'public interest, convenience, and necessity' is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

<sup>10</sup> *Minority Ownership Report*, supra.

<sup>11</sup> *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

As new interest groups and hitherto silent minorities emerge in our society, they should be given the same stake in the chance to broadcast on our radio and television frequencies.<sup>12</sup>

In *TV 9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974), the Court again dealt with the issue of minority ownership. In reversing a decision where the Commission had refused to award merit to an applicant in a comparative proceeding based upon minority ownership and participation the Court emphasized:

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media entrepreneurship. . . .

We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded.

The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.<sup>13</sup>

The Court made plain that minority ownership and participation in station management is in the public interest both because it would inevitably increase the diversification of control of the media and because it could be expected to increase the diversity of program content.<sup>14</sup>

The Commission has acted in accordance with these judicial expressions. Its Administrative Law Judges have afforded comparative merit to applicants for construction permits where minority owners were to participate in the operation of the station.<sup>15</sup> The Commission itself has ordered the expedited processing of several applications filed by applicants with significant minority ownership interests.<sup>16</sup>

Nevertheless, the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action.<sup>17</sup> Accordingly, in issuing this statement of policy, we today endorse our commitment to increasing significantly minority ownership of broadcast facilities.

To implement our policy we initiate the first of several steps we expect to consider in fostering the growth of minority ownership.

In conjunction with our customary examination of assignment and transfer applications,<sup>18</sup> we intend to examine such applications where

<sup>12</sup> 447 F.2d at 1213 n. 36.

<sup>13</sup> 495 F.2d at 937-38 (emphasis added).

<sup>14</sup> As the Court observed in a subsequent opinion: "The entire thrust of *TV 9* is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that reasonable expectation without 'advance demonstration' gives them relevance." *Garrett v. FCC*, 168 U.S. App. D.C. 266, 273, 513 F.2d 1056, 1063 (1975), 1055, 1063 (D.C. Cir. 1975) (footnote omitted).

<sup>15</sup> *Berryville Broadcasting Co.*, Docket 21185, FCC 78D-16 (1978); *Roseman Broadcasting Co., Inc.*, Docket Nos. 19887-8, 54 FCC 2d 394 (1976); *Robert M. Zitter and Hillary E. Zitter*, Docket 20243, FCC 75D-43 (1975).

<sup>16</sup> *Atlas Communications, Inc. (WJPC)*, 61 FCC 2d 995 (1976); *Hagadone Capital Corporation*, FCC 78-123, 42 P&F Radio Reg. 2d 632 (1978); *Letter to Messrs. L. Glaser and Francis E. Fletcher, Jr.*, FCC 78-167, adopted February 22, 1978; *Letter to Ken Goodman*, FCC 78-279, adopted April 20, 1978; *Letter to Terry E. Tyler*, FCC 78-280, adopted April 20, 1978.

<sup>17</sup> For a general treatment of the growth of Black-owned radio, see *Bachman, Dynamics of Black Radio*, (1977).

<sup>18</sup> See Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b).

68 F.C.C. 2d

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<sup>19</sup> to the assignors or transferors where we find it appropriate to advance our policy of increasing minority ownership.<sup>20</sup> A similar proposal was advanced to us by the National Association of Broadcasters and has won the endorsement of, among others, the Carter Administration, the American Broadcasting Companies, General Electric Broadcasting Company and the National Black Media Coalition.

Moreover, in order to further encourage broadcasters to seek out minority purchasers, 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<sup>21</sup> to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications.

While we normally permit distress sales when the licensee is either bankrupt or physically or mentally disabled, there is precedent for such sales based on other grounds. See e.g. *Radio San Juan*, 29 P&F Radio Reg. 2d 607 (1974). The avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrent to wrongdoing. We contemplate grants of distress sales in circumstances similar to those now obtaining except that the minority ownership interests in the prospective purchaser will be a significant factor. The parties involved in each proposed transaction will be expected to demonstrate to us how the sale would further the goals on which we are today basing the extension of our distress sale policy. All such transactions will be scrutinized closely to avoid abuses.

The Congressional Black Caucus has petitioned for rulemaking to permit distress sales to minorities. While we endorse the goal of such a proposal we have concluded that cases should be reviewed as they arise to determine that the objectives of our policies will be met. Consequently, for the present a rigid rule on such sales will not be adopted.

Applications by parties seeking relief under our tax certificate and distress sale policies can be expected to receive expeditious processing.

<sup>19</sup> Under 26 U.S.C.A. Section 1071, 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 a 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. *Issuance of Tax Certificates*, 19 P&F Radio Reg. 2d 1831 (1970).

<sup>20</sup> 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.

<sup>21</sup> 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 FCC 2d 112 (1970); *Northwestern Broadcasting Corporation (WLTH)*, 65 FCC 2d 66 (1977).

We are keenly aware that the first steps we announce today do not approach a total solution to the acute underrepresentation problem. They are made possible because proposals raising these issues have been submitted to us and these proposals, the collective comments received thereon, and the findings of our Minority Ownership Task Force provide us with a compelling record upon which to base our action.

Beyond the steps taken today, we intend to examine, among other things, the recommendations set forth in the *Minority Ownership Report*. Also, while the immediate area of concern of this statement has been broadcasting, it is expected that in the future attention will also be directed towards improving minority participation in such services as cable television and common carrier. Finally, as was concluded in our *Minority Ownership Report*, if the goal of significant minority ownership is to be reached, Congress, other governmental agencies, and the private sector must join in these efforts. We welcome petitions for rulemaking or other submissions from concerned parties as to other actions we might take to reach our objectives.<sup>22</sup>

Action by the Commission May 17, 1978. Commissioners Ferris (Chairman), Lee, Quello, Washburn, Fogarty, White and Brown.

FEDERAL COMMUNICATIONS COMMISSION

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<sup>22</sup> For example, while today's actions are limited to minority ownership because of the weight of the evidence on this issue, other clearly definable groups, such as women, may be able to demonstrate that they are eligible for similar treatment.

# SENATE CORRESPONDENCE

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

March 8, 1995

IN REPLY REFER TO:

**BY COURIER**

The Honorable Bob Packwood  
United States Senate  
Committee on Finance  
219 Dirksen Building  
Washington, DC 20510-6200

Dear Senator Packwood:

At yesterday's hearing before the Committee on Finance, Senator Dole requested that the Federal Communications Commission's policy statements related to tax certificates be provided to the Committee for inclusion in the record. He also requested copies of Commission decisions applying these control tests. I enclose three such statements and three decisions explaining the Commission's definition of "control" in the tax certificate context:

1. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978).
2. In the Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982).
3. Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR.2d 1469 (1982).
4. In re Application of Nevada Independent Broadcasting Corp., 71 FCC 2d 531 (1979).
5. R. Clark Wadlow, Esq., 4 FCC Rcd. 5262 (1989).
6. Martin J. Gaynes, Esq., 5 FCC Rcd. 6781 (1990).

I have provided these documents to Senator Dole by courier today.

Sincerely,



William E. Kennard  
General Counsel

Enclosures

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WASHINGTON, D.C. 20554

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MINORITY OWNERSHIP IN BROADCASTING



Finally, it should be noted that courts give considerable deference to FCC discretion concerning the appropriate sanction to apply to licensee misconduct. FCC v. WOKO, Inc., 329 US 223, 228-29 (1946); Lorain Journal Co. v. FCC, 351 F2d 824, 831 [5 RR 2d 2111] (DC Cir. 1965), cert. denied sub. nom. W.W.I.Z., Inc. v. FCC, 383 US 967 (1966). "[T]he Commission is [not] bound . . . to deal with all cases at all times as it has dealt with some that seem comparable." 329 US at 228. Given that discretion we cannot say the sanction was inappropriate in this case.

C. Substantial evidence.

Appellant's final claim is that the Commission did not have substantial evidence to support its finding that West Coast did not make good faith efforts to meet its programming proposals. The licensee had the burden of proof on this issue and the Commission determined that West Coast failed to carry that burden in light of, inter alia, the following evidence:

- KDIG's actual nonentertainment programming was virtually zero throughout the term and was never close to what it had promised.
- West Coast poured resources and staff into its Orange, Calif. station at the expense of KDIG, reducing the staff at KDIG to three, and thereby making it virtually impossible to comply with its programming promises.
- West Coast's principal acknowledged he was unaware of the nature of KDIG's programming during most of the term.
- The station employees charged with developing public affairs programming neither saw the station's ascertainment survey nor were told of its results.
- "only as renewal time approached was any effort made to provide a trained employee for the fulltime production of nonentertainment programming."

We cannot say the Commission's conclusion was unsupported or arbitrary or capricious.

Affirmed.

FCC 82-523  
32503  
48 FR 5976

In the Matter of )  
 )  
 Commission Policy Regarding the Advancement ) Gen. Docket No. 82-797  
 of Minority Ownership in Broadcasting )

Adopted: December 2, 1982  
Released: December 13, 1982

[§32:1, §53:24, §53:24(K), §53:24(Z)(7)] Policy supporting minority ownership.

In an effort to increase opportunities for minority ownership of broadcast facilities, the Commission issues a policy statement supplementing the 1978 Policy Statement (42 RR 2d 1689). In the future, the Commission will consider issuing tax certificates and authorizing distress sales in transfers to limited partnerships where a minority general partner or partners owns more than twenty percent of the broadcasting entity, and issuing tax certificates to shareholders upon divestiture of their interest in minority controlled broadcasting entities, where such



divestiture furthers minority ownership. In order to avoid "sham" arrangements, the Commission will continue to review limited partnership agreements to ensure that complete managerial control over the station's operations is vested in the general partners. In order to facilitate minority ownership and expedite the handling of distress sale petitions, authority is delegated to the Mass Media Bureau to process and grant applications that are consistent with established Commission policy and do not involve novel questions of fact, law or policy in the area of distress sales. Minority Ownership in Broadcasting, 52 RR 2d 1301 [1982].

#### POLICY STATEMENT AND NOTICE OF PROPOSED RULE MAKING

By the Commission: (Chairman Fowler issuing a separate statement.)

##### Introduction

1. The Commission has traditionally considered the underrepresentation of minority points of view over the airwaves as detrimental to minorities <sup>1/</sup> and the general public. Accordingly, we have taken steps to enhance the ownership and participation of minorities in the media, with the intent of thereby increasing the diversity in the control of the media and thus diversity in the selection of available programming, benefitting the public and serving the principle of the First Amendment. <sup>2/</sup> This Policy Statement will deal with our continuing concern with enhancing minority ownership of broadcast properties.

##### Background

2. To ensure that programming reflects and is responsive to minorities' tastes and viewpoints, the Commission has promulgated equal employment opportunity regulations requiring licensees to institute affirmative action programs, <sup>3/</sup> and ascertainment procedures requiring licensees to conduct discussions with significant groups, including minority leaders, in the community. <sup>4/</sup> However, it became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional measures were necessary. In our

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<sup>1/</sup> For purposes of this statement, the term "minority" includes American Indians or Alaskan Natives, Asians and Pacific Islanders, Blacks and Hispanics. 47 USC §309(i)(3)(C).

<sup>2/</sup> The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." Associated Press v. United States, 326 US 1, 20 (1943).

<sup>3/</sup> See 47 CFR §§73.125, 73.301, 73.599, 73.680, and 73.793; see also Nondiscrimination in Employment Practices of Broadcast Licensees, 13 FCC 2d 766, 774 [13 RR 2d 1645] (1968). It should be noted that the Commission recently extended its equal employment opportunity regulations to two newly authorized services, low power television, Low Power Television, 47 FR 21468 [51 RR 2d 476] (May 18, 1982), and direct broadcast satellite systems, Report and Order, 47 FR 31553 [51 RR 2d 1341] (July 21, 1982). See also Nondiscrimination Employment Practices of Broadcast Licensees, 54 FCC 2d 354, 356 (1975).

<sup>4/</sup> Ascertainment of Community Problems by Broadcast Applicants, 57 FCC 2d 418, 419 [35 RR 2d 1555] (1976). We should point out that while we eliminated formal ascertainment requirements for commercial radio stations in our radio deregulation proceeding (BC Docket No. 79-219), we nevertheless indicated that broadcasters could not engage in intentional discrimination against minority groups in their selection of issues to be addressed with programming. Deregulation of Radio, 84 FCC 2d 968, 978 [49 RR 2d 1] (1981). We cautioned that such discrimination would be viewed with "utmost gravity." Id. at 1089.



Statement of Policy on Minority Ownership of Broadcasting Facilities (hereinafter cited as the 1978 Policy Statement), 5/ we noted that:

"While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. . . . 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."

3. Thus, in 1978, we articulated the important policy goal of encouraging minority ownership of broadcast facilities, and implemented that policy by announcing the availability of tax certificates and distress sales to minority-owned or controlled enterprises. 6/ Tax certificates are authorized, under 26 USC §1071, in sales or exchanges of broadcasting properties where the Commission determines that such sales or exchange are "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by the Commission with respect to the ownership and control of radio broadcasting stations. . . ." A tax certificate enables the seller of a broadcast station to defer the gain realized upon a sale, either by: (1) treating it as an involuntary conversion, under 26 USC §1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, under 26 USC §1071, or both. The distress sale policy allows broadcasting licensees whose licenses have been designated for revocation hearing, prior to the commencement of a hearing, to sell their station to a minority-owned or controlled entity, at a price "substantially" below its fair market value. A licensee whose license has been designated for hearing would ordinarily be prohibited from selling, assigning or otherwise disposing of its interest, until the issues have been resolved in the licensee's favor. 7/ Thus, extension of the tax certificate and distress sale policies fosters minority ownership by providing broadcast licensees with an incentive to transfer their interests to minority-owned or controlled entities. 8/

4. Minority participation in broadcasting was also promoted through other means. The Court of Appeals determined that minority ownership of and participation in broadcasting should be encouraged and afforded merit in a comparative hearing context, recognizing the "connection between diversity of ownership of the mass media and diversity of ideas and expression required by the First Amendment." 9/ Additionally, the Commission has indicated that waivers of the trafficking rule 10/ and the multiple ownership rules 11/ would

5/ 68 FCC 2d 979, 980-981 [42 RR 2d 1689] (1978).

6/ For a more detailed discussion of tax certificates, see paragraph 13, *infra*, and of distress sales, see paragraph 19, *infra*.

7/ Bartell Broadcasting of Florida, Inc., 45 RR 2d 1329, 1331 (1979).

8/ We should point out that licensees whose licenses have been designated for hearing may not avail themselves of a tax certificate in addition to a distress sale. Blue Ribbon Broadcasting, Inc., 76 FCC 2d 429, 431 n. 6 (1980).

9/ TV 9, Inc. v. FCC, 495 F2d 929, 937-938 [28 RR 2d 1115; Supp. op., 29 RR 2d 963] (DC Cir. 1973) cert. denied, 418 US 986 (1974). Additionally, the court of appeals noted that:

"The fact that other [licensee] applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." *Id.* at 938.

10/ 47 CFR §§73.35, 73.240 and 73.636.

11/ 47 CFR §73.3597.



be considered and might be appropriate where minority ownership is thereby increased. 12/ Moreover, we have in fact waived our requirements 13/ and awarded comparative merit to minority applicants 14/ in the interest of promoting minority entrepreneurship.

5. Since 1978, we have approved 27 distress sales and 55 tax certificates, which have contributed significantly to increased minority ownership in broadcasting. However, we consider the ever-present "dearth of minority ownership" in the telecommunications industry to be a serious concern, and we are committed to further encouraging minority entry into the industry. We therefore, created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (Advisory Committee) for the purpose of exploring means to facilitate minority ownership of telecommunications properties. 15/

6. This Policy Statement emanates from recommendations pertaining to the acquisition of broadcasting facilities that were proposed by the Advisory Committee. The Advisory Committee's recommendations were primarily directed toward ameliorating existing Commission policies which tend to inhibit minority entrance into the broadcasting market. Specifically, the Committee recommended that the Commission:

(1) clarify the 1978 Policy Statement to indicate that (minority) general partners, holding more than a twenty percent interest in limited partnerships, exercise sufficient control and satisfy the test for tax certificates and distress sales;

(2) adopt a "capitalizing feature" for tax certificates to enable shareholders with less than a controlling interest in a minority-controlled broadcasting entity to sell their interest and become eligible for a tax certificate;

(3) expedite the handling of distress sale petitions by delegating authority to the Mass Media Bureau to process and grant those petitions that meet Commission standards and are consistent with Commission policies;

(4) expand the rights of seller-creditors, including the right of reversionary interests in broadcast licenses, in seller financed transactions;

(5) amend the multiple ownership rules to permit increased equity participation by venture capital companies in the acquisition of telecommunications properties by minority entrepreneurs; 16/ and

(6) amend the multiple ownership rules to permit established broadcasting entrepreneurs to acquire equity interests in minority-controlled entities. 17/

12/ Minority Ownership of Broadcasting Facilities, 69 FCC 2d 1591, 1596-1597 [44 RR 2d 1051] (1978). However, given the myriad of potential factual situations and the competing policies underlying those rules, we declined to specify the kind of cases where waivers would be granted.

13/ E. g., in *Atlass Communications, Inc.*, 61 FCC 2d 995, 997 [39 RR 2d 228] (1976), the allocation requirements were waived and a Black-owned daytime broadcast station was permitted to operate at night.

14/ E. g., in *Rosemor Broadcasting, Co., Inc.*, 54 FCC 2d 394, 418 (1975), merit was awarded to an applicant whose owner principals were minority women who were also to be involved in the management of the proposed station.

15/ The Advisory Committee was created in September of 1981, and was comprised of leaders in the financial, telecommunications, private and public sectors. For a list of Advisory Committee members, see Appendix A.

16/ Specifically, the Advisory Committee recommended that the multiple ownership rules (see note 11, *supra*) be amended to either exempt or raise the "reportable interest" level of venture capital companies (including private venture capital investment companies and small business investment companies).

17/ [Footnote on following page]



The Advisory Committee noted that "financing has remained the single greatest obstacle" to minority entry into the telecommunications industry. Therefore, the Advisory Committee's recommendations mainly focused upon enhancing minority entrepreneurship by increasing their opportunities to attract investors in their enterprises, and thus secure financing.

We believe it is appropriate to defer immediate consideration of items (5) and (6) above, the Advisory Committee's recommended amendments to our multiple ownership rules. We are in the process of undertaking a comprehensive review of those rules, and we believe it is more productive at this point to consider any minority ownership implications of these rules in the context of our overall review.

### Discussion

#### Limited Partnerships

7. As previously stated, to foster minority ownership of broadcasting facilities, in 1978 we extended the availability of tax certificates and distress sales to minority entities. At that time, we indicated that the purchasing entity would be deemed qualified for purposes of tax certificates where the minority ownership interest in the entity exceeded fifty percent or was controlling. <sup>18/</sup> The same ownership requirement has since been applied to distress sales. <sup>19/</sup> By so establishing the ownership requirement, we did not intend to preclude from consideration other cases where "minority involvement is significant enough to justify" tax certificates or distress sale treatment. However, the requirement has evolved into a rather rigid standard from which we have departed but once. <sup>20/</sup> In William M. Barnard, we determined that issuance of a tax certificate was justified under the circumstances, because minority group members owned, directly or indirectly, 45.5 percent of the partnership interest in the purchasing entity, and the sole general partner, who had the "exclusive authority to manage and control" its affairs, was a minority individual who owned an 11.4 percent interest individually as well as a 52.4 percent interest in a corporation with a 25 percent limited partnership interest in the entity. By so issuing the tax certificate, we recognized the fact that a limited partnership, by its nature, vests complete control over the station's affairs in the general partner. We also recognized that where the general partner is a minority individual with a substantial, but not controlling, equity interest in the entity, sufficient minority involvement has been demonstrated to justify issuance of a tax certificate. We cautioned, however, that "serious concern would arise where tax certificates are sought for sales to limited partnerships in which minorities exercise control but have no substantial ownership interest."

8. The Advisory Committee recommended that the Commission explicitly recognize the unique nature of limited partnerships. The Advisory Committee requested the Commission

#### 17/ [Footnote from preceding page]

As an alternative, the Advisory Committee recommended that "the established multiple owner [be allowed] to acquire the additional prohibited property, provided he assisted a minority in the financing of another comparable venture." Such "joint venturing" was deemed desirable, in that experienced broadcasters afford managerial and technical expertise, and may provide additional financing to minority entrepreneurs just entering the complex field of telecommunications.

<sup>18/</sup> 1978 Policy Statement, *supra*, at 983 n. 20.

<sup>19/</sup> E. g., *Grayson Enterprises, Inc.*, 47 RR 2d 287, 294 (1980).

<sup>20/</sup> For instance, in *Long-Pride Broadcasting Co.*, 48 RR 2d 1243 (1980), we denied the issuance of a tax certificate in connection with the sale of a broadcast station, where the minority owned 45 percent of the purchasing entity's stock, and was able to vote an additional 10 percent through a voting trust. We stated that the minority's involvement was not significant enough to justify issuance of a tax certificate, alluding to the "tenuous nature" of voting trusts. *Id.* at 1245.



to indicate that in cases where the general partner is a minority individual and owns more than a 20 percent interest in the broadcasting entity, there exists sufficient minority involvement to justify favorable application of the Commission's tax certificate and distress sale policies.

9. Limited partnerships are creatures of statute. While the laws may vary from jurisdiction to jurisdiction, the general scheme - in terms of constitution, purpose, and effect - remains the same. 21/ Essentially, a limited partnership is a business enterprise composed of: (1) one or more general partners who exercise complete managerial control over the business' affairs and who are personally liable for the partnership debts; and (2) one or more limited partners who invest capital and share in the profits, but do not exercise any managerial control and do not incur any personal debts beyond their initial capital contribution. 22/ Limited partnerships are designed to encourage trade by uniting parties who possess capital to invest with parties who are willing to expend their energies and efforts actively running a business. 23/ Since complete control and management rests with the general partner, the limited partner's investment is akin to that of a corporate shareholder who has limited liability and lacks a voice in the operation of the enterprise. 24/

10. In *Anax Broadcasting, Inc.*, 25/ we determined that the failure to adequately identify the limited partners in a construction permit application was insignificant and did not require dismissal of the application because, under the limited partnership agreement, the limited partners had only a passive interest in the enterprise (i. e., they would not participate in the station's daily operations). 26/ We also stated that the transfer of additional shares to the general partner (which increased his ownership interest from 28 percent to 99 percent) was insignificant, for "regardless of whether the general partner owned a 28 percent interest in the applicant or a 99 percent interest," the general partner would still have "total operating control." 27/

11. Thus, in *Anax Broadcasting, Inc.* and *William M. Barnard*, we already have acknowledged the unique nature of limited partnerships. Accordingly, we are adopting the Advisory Committee's recommendation. We will henceforth consider issuing tax certificates and authorizing distress sales in transfers to limited partnerships where the general partner, or partners, owns more than 20 percent of the broadcasting entity and is a member, or members, of a minority group. 28/ We are, thus, explicitly recognizing the "significant minority involvement" which exists by virtue of a minority general partner's ownership interest and complete control over a station's affairs. 29/ Moreover, we are increasing minority

21/ 68 Corpus Juris Secundum, Partnership, §§449-450.

22/ *Evans v. Galardi*, 546 P2d 313, 317 (1976).

23/ *Id.* at 318.

24/ *Hirsch v. DuPont*, 396 F Supp 1214 (SD Calif. 1975), affirmed, 553 F2d 750 (1975); *Lichtyger v. Franchard Corp.*, 223 NE 2d 869, 873 (1966). In fact, any active participation in the enterprise's affairs would remove the limited partner's shelter and subject him to personal liability as a general partner. *Lichtyger v. Franchard Corp.*, supra, at 873; *Toor v. Westover*, 200 F2d 713, 715 (9th Cir. 1953), cert. den., 345 US 975 (1953).

25/ 49 RR 2d 1589 (1981).

26/ *Id.* at 1593-1594.

27/ *Id.* at 1593.

28/ The minimal ownership requirement of 20 percent was recommended by the Committee as reflecting the realities of the financial and business world. We accept their recommendation, in this regard, as a realistic threshold.

29/ We have generally found "control" to be in those who have authority to determine the basic policies of a station's operations, including programming, personnel and financial matters. *Southwest Texas Broadcasting Council*, 85 FCC 2d 713, 715 [49 RR 2d 156] (1981).



opportunities by enabling minority entrepreneurs to capitalize their broadcasting ventures by attracting and utilizing the investments of others to a greater extent. Although we are considering such limited partnerships for tax certificate and distress sale purposes, we should make clear that in order to avoid "sham" arrangements, we will continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s).

#### Tax Certificates as Creative Financing Mechanisms

12. As noted previously, a tax certificate enables the seller to defer taxes on capital gains, and thus provides an incentive to transfer a broadcast station to a minority-owned or controlled entity. Moreover, a "tax certificate effectively subsidizes the bargaining position of minority entrepreneurs seeking to enter the telecommunications marketplace" because a "tax certificate is effective only in those situations where the seller's capital gains savings exceeds the difference in purchase price offered by a non-minority and a minority purchaser." <sup>30/</sup> While the Advisory Committee recognized that tax certificates have successfully contributed to the acquisition of broadcast properties by minorities, <sup>31/</sup> it envisioned a more expansive approach to the administration of tax certificates.

13. In essence, the Advisory Committee recommended that the Commission adopt a policy whereby shareholders in a minority controlled broadcasting entity would be eligible for a tax certificate upon the sale of their shares, provided their interest was acquired to assist in the financing of the acquisition of a broadcast facility. According to the Advisory Committee:

"This expansion of the tax certificate would enable minority entrepreneurs to attract investors before the transaction is completed, when securing financing is critical, by promising them significant capital gains deferral on the scale of their interest to the controlling shareholder.

"[Additionally], this 'capitalizing feature' of the tax certificate would enable investors to sell their interest at any time and apply for a tax certificate. Therefore, the capitalizing feature would also serve as a major incentive for investment in minority businesses after the entity has acquired a broadcast property, thereby stabilizing the capital base of existing minority-owned or controlled businesses." <sup>32/</sup>

By so broadening the tax certificate policy, the pressing dilemma minority entrepreneurs face - the lack of available financing to capitalize their telecommunications ventures - is met and a creative tool of financing is created. Additionally, the Advisory Committee states that this would allow "minority entrepreneurs to share more meaningfully in the benefits of Section 1071." <sup>33/</sup>

14. Section 1071 of the Internal Revenue Code confers broad jurisdictional powers upon the Commission, normally reserved to the Treasury, to issue tax certificates. <sup>34/</sup> The Commission's grant of a tax certificate is solely dependent upon its finding that a sale or exchange of property is "necessary or appropriate" to effectuate the adoption of a new policy or a change in an existing policy relating to the ownership and control of broadcasting

<sup>30/</sup> The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, pp. 8-9 (May 1982) (hereinafter cited as the Final Report).

<sup>31/</sup> See paragraph 5, *supra*.

<sup>32/</sup> Final Report, *supra* at 8.

<sup>33/</sup> *Id.* at 9.

<sup>34/</sup> Blake and McKenna, Section 1071: Deferral of Tax on FCC Sanctioned Dispositions of Communications Properties, 36 Tax L. Rev. 101, 103 (Fall 1980).



property. The Commission establishes policies in the first instance and makes the determination as to whether a particular transaction furthers a specific policy. In the past, the Commission's strict construction of the statutory term "necessary or appropriate" led it to require a showing of the "involuntary" nature of the divestiture, 35/ and later to require a showing of the "causal relationship" between the divestiture and the specific Commission policy, as a condition for the issuance of a tax certificate. 36/ The Commission has since abandoned its strict construction of Section 1071 by recognizing that voluntary divestitures that effectuate specific ownership policies are "appropriate," and by eliminating the "causal relationship" requirement. 37/ In 1978, we further expanded our tax certificate policy by announcing the availability of such certificates in transactions that further minority ownership. 38/

15. In accordance with the Advisory Committee's basic recommendations, we believe that a further expansion of our tax certificate policy to include the Advisory Committee's recommendation (See para. 14, supra) will facilitate initial investments in minority-controlled stations; will contribute toward the stabilization and improvement of their operation, once established; and ultimately will serve to increase minority ownership of broadcast properties. The use of tax certificates as creative financing tools will facilitate significantly minority entrepreneurs' access to necessary financing, thus effectuating the important policy of promoting minority ownership. Accordingly, we are expanding our tax certificate policy in this area.

16. Generally, to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51 percent. 39/ However, our expansion of the tax policy differs in some respects from that contemplated by the Committee. First, tax certificates will only be available to initial investors who provide "start-up" financing, which allows for the acquisition of the property, and those investors who purchase shares within the first year after license issuance, which allows for the stabilization

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35/ See Public Notice, No. 36410, FCC 56-919 (September 27, 1956). But see *Jefferson Standard Broadcasting Co. v. FCC*, 305 F Supp 744, 748-749 [17 RR 2d 2003] (WD NC 1969), where the court determined that Congress did not intend to restrict Section 1071 to involuntary divestitures and ordered the Commission to issue a tax certificate. The court stated that "[e]ntitlement to the tax deferral certificate contemplated in Section 1071 is not dependent on whether the sale was 'involuntary' or was directly ordered by court or by the Commission." *Id.* at 749.

36/ In this regard, the Commission stated that issuance of a tax certificate was dependent upon its finding as to whether there was a causal relationship between the adoption of a new Commission policy and the sale in question, and whether issuance of the certificate was "necessary or appropriate" to effectuate the new policy. Pertinent factors in determining whether a sale was "necessary or appropriate" included: (1) the occurrence of the sale within a reasonable time span of the adoption of a new policy, such as one license period; (2) a showing that the policy was a significant factor in the sale; and (3) a showing that the sale was consistent with our general experience in the broadcast field. *Issuance of Tax Certificates*, 19 RR 2d 1831, 1832 (1970).

37/ *In re Issuance of Tax Certificates*, 59 FCC 2d 91 [36 RR 2d 1510] (1976).

38/ Prior to 1978, the tax certificate policy only applied to transfers involving multiple ownership. We recently announced our intent to limit the award of tax certificates to those properties whose sale directly effectuates Commission policy. This revised policy was prompted by the difficulties attaching to the application of the 1976 policy to divestitures arising in the context of our cable television cross-ownership rules, 47 CFR §76.501 et seq. We do not anticipate that this revised policy will affect the conferring of tax certificates as creative financing mechanisms to facilitate minority ownership.

39/ By so requiring remaining 51 percent minority control, we do not mean to preclude consideration of cases where "minority involvement would have been significant enough" to justify the issuance of a tax certificate in the first instance. (See paras. 8 and 12, supra.)



of the entity's capital base. (The Committee's recommendations did not include any time limitation.) We believe that to extend the availability of tax certificates beyond those shareholders would invite abuse and overprotect minority entrepreneurs against the realities of the marketplace which all licensees must face. Additionally, the identity of the divesting shareholders, as well as the identity of those purchasing the divested shares, is not material, because the goal behind expanding the tax certificate policy is to provide minorities opportunities to procure financing and thereby increase minority ownership of broadcasting stations. 40/

17. Generally, tax certificates have been issued only upon completion of sale transactions. However, upon request we have issued advisory opinions on whether a tax certificate would be forthcoming once the sale or exchange occurred. 41/ Given the inherent uncertainties attendant on negotiations and various potential factual circumstances, we still would be reluctant to issue tax certificates prior to the actual sale or exchange. Thus, we are adopting the Committee's proposal but limiting it to indicate that tax certificates will be available upon the actual divestiture of shares by investors who initially purchase shares in the broadcasting entity or purchase shares within one year after the issuance of a broadcast license, and who show that their capitalization either enabled a minority owned or controlled entity to acquire a broadcast property or provided necessary start-up financing. If parties have uncertainties regarding the tax consequences of prospective transactions, they always can, of course, request a declaratory ruling from the Commission. Such requests will be handled as expeditiously as possible.

#### Expedited Processing of Distress Sales

18. The Committee recommended that the Commission delegate authority to the Mass Media Bureau to process and grant distress sale petitions that are consistent with established Commission policy. As we previously noted, our distress sale policy marks a departure from our long established practice of prohibiting a licensee in a renewal or revocation hearing from disposing of its interest prior to the resolution of issues in its favor. 42/ In 1978, we stated that "applications by parties seeking relief under our . . . distress sale policies can be expected to receive expeditious processing." However, to safeguard against possible abuse and to ensure that our policy objectives were being met, the Commission stated that it (rather than the staff) would administer distress sales on a case-by-case basis. 43/

19. The evolving nature of our distress sale policy necessitated such an individualized approach. However, we believe that the subsequent case law has established sufficient safeguards and standards by which prospective distress sale petitions may be reviewed and processed by our staff. 44/ Therefore, to further facilitate minority ownership

40/ For example, assume shareholder A, a Black person, owns 70 percent of Corporation X, while shareholders B and C each own 15 percent. If B and C purchased their shares before or within one year after acquisition of a license, they can later sell their interest and be eligible to receive a tax certificate. Whether B and C and/or the subsequent buyers are racial or ethnic minorities would be inconsequential - what is relevant is that B and C provided necessary financing enabling a minority-owned or controlled entity to acquire and start a broadcasting station, thereby increasing minority ownership in the market. So long as the entity is minority controlled, it is immaterial whether minority members own 51% or 91%.

41/ William S. Green, 59 FCC 2d 78, 79 [36 RR 2d 1507] (1979); J. A. W. Iglehart, 38 FCC 2d 541, 542 [26 RR 2d 6] (1972).

42/ 1978 Policy Statement, *supra* at 983.

43/ *Id.* at 983.

44/ We have applied the tax certificate standard (minority ownership which exceeds 50 percent or constitutes a controlling interest - Policy Statement, *supra* at 983 n. 20) to distress sales. We have also established procedures for determining the adequacy of a distress sale price. Grayson Enterprises, Inc., 77 FCC 2d 156, 163-164 [47 RR 2d 287] (1980); Northland Television, Inc., 72 FCC 2d 51-54-56 [45 RR 2d 750] (1979).



and expedite the handling of distress sale petitions, we are delegating authority to the Mass Media Bureau to process and grant those petitions that are consistent with established Commission policy and do not involve novel questions of fact, law or policy in the area of distress sales.

#### Notice of Proposed Rule Making - Seller-Creditors' Rights

20. Given the current economic conditions of the telecommunications market, 45/ the Committee stated that seller financing in station transfers has become a prevalent practice and should be encouraged, particularly since it is obviously one of the ways that minorities can obtain broadcasting properties. 46/ Although a seller-creditor currently may take a security interest in the station's physical assets or stock in the corporate licensee 47/ as protection against the purchaser's possible default, the Committee believed that seller-financed transfers further would be stimulated if the seller were afforded additional protection. Specifically, the Committee recommended that in those cases where the seller provides financing, the seller-creditor's rights be expanded to include a right of reversionary interest in the license.

21. There is a longstanding principle, followed by the Commission 48/ and affirmed by the United States Supreme Court, 49/ that a broadcast license is a valuable, though limited, privilege to utilize the airwaves, rather than a property right. As such, the license has not been subject to a reversionary interest, a mortgage, a lien, a pledge or any other form of security. 50/ This principle appears to be dictated by the Communications Act of 1934,

45/ The Committee cited two structural problems in the marketplace that affect "all broadcasters, particularly small ones," in obtaining capital as including:

"(1) The current high interest rates which reduce the comfort level of lenders in all investments (thereby increasing the level of equity required to attain a given capitalization), and which consume cash flow (reducing immediate return on equity); and

"(2) The fact that presently broadcasting is not providing a high enough return on equity invested to attract venture capital participation." Final Report, *supra* at 25-27.

46/ According to the Committee. "[i]n 1981, of the 487 station transfers filed with the FCC, two-thirds involved some form of seller financing." Final Report, *supra* at 33 (citing Broadcast Investor, April 22, 1982, Issue No. II, p. 1, Paul Kagan Associates, Inc., Carmel, Calif.).

47/ The Commission already recognizes and approves of contracted arrangements, whereby 50% or more of the stock is pledged, where the contract (1) provides that the licensee-borrower retains the voting rights; and (2) provides for a public or private sale which would ensure that the licensee's equity is protected. Moreover, 49.99% of the stock (representing the absence of positive or negative control) currently may be foreclosed, without prior Commission approval under 47 USC §310.

48/ See, e.g., *Churchill Tabernacle v. FCC*, 160 F2d 244 (DC Cir. 1947); *Radio KDAN, Inc.*, 11 FCC 2d 934 [12 RR 2d 584] (1968); *Yankee Network, Inc.*, 13 FCC 1014 (1949), *Bonanza Broadcasting Corp.*, 11 RR 2d 1072 (1967); *Alabama Polytechnic Institute*, 7 FCC 225 (1939); *Associated Broadcasters, Inc.*, 6 FCC 387 (1938).

49/ *Ashbacker Radio Corp. v. FCC*, 326 US 327, 331-32 (1945); *FCC v. Sanders Bros. Radio Station*, 309 US 470, 475 [9 RR 2008] (1940).

50/ For instance, in *Radio KDAN, Inc.*, 13 RR 2d 100 (1968), the Commission declared a contractual provision that purported to mortgage and create a reversionary interest in the license as void ab initio. The Commission stated, "The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable." *Id.* at 101. Likewise, the Commission has prohibited the sale or transfer of a bare license. *Bonanza Broadcasting Corp.*, 11 RR 2d 1072, 1073 (1967); *Donald L. Horton*, 11 RR 2d 417, 419-420 (1967).



as amended. Specifically, 47 USC §301 states, in pertinent part, that it is the purpose of the Act "to provide for the use of [radio transmissions] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and period of the license. . . ." (Emphasis added). Additionally, 47 USC §304 requires an applicant for a license to "waive any claims to the use of any particular frequency . . . because of the previous use of the same, whether by license or otherwise;" and 47 USC §309(h) requires a station license to contain the following statement: "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated by the license beyond the term thereof. . . ." Finally, 47 USC §310(d) requires Commission approval prior to the transfer, assignment or disposal of rights in a construction permit or station license. The correlary Commission rule is contained in 47 CFR §73.1150 which prohibits agreements, express or implied, that allow a licensee to: (1) retain an interest in the license; (2) claim a right to future assignment of the license; or (3) reserve a privilege to use the broadcast facilities, upon the sale or transfer of its interest in the broadcast station. 51/

22. We recognize that seller financing may facilitate the sale of a broadcast property, but limitations have been imposed on the types of security interests sellers can retain as part of the financing arrangements. We believe it appropriate to inquire as to whether certain limitations could be removed, consistent with the provisions of the Communications Act, so as to further encourage the use of this financing tool, particularly where the transaction would enhance minority ownership of the media of mass communications. Accordingly, interested parties are invited to address themselves to the type of security interest that can be retained by a seller-creditor; whether that interest can or should include a reversionary interest in the license itself; and the legal process, if any, that should be required before the creditor could exercise its reversionary interest.

#### Conclusion

23. The Commission issues this Policy Statement to expand and reaffirm the 1978 Policy Statement with the hope that the policies initiated herein will offer meaningful new opportunities to increase minority ownership. Accordingly, this Policy Statement is but the latest step in an ongoing effort. The Commission will revisit these policies to assess their effectiveness and, if necessary explore additional policies and procedures to remedy the underrepresentation of minorities in media ownership. Henceforth we will consider:

(1) Issuing tax certificates and authorizing distress sales in transfers to limited partnerships where a minority general partner (or partners) owns more than 20 percent of the broadcasting entity; and

(2) Issuing tax certificates to shareholders upon divestiture of their interest in minority controlled broadcasting entities, where divestiture furthers minority ownership.

Moreover, to expedite the handling of distress sale petitions, we are delegating authority to the Mass Media Bureau to process and grant those petitions which are consistent with Commission precedent and policy. Finally, we are instituting a rule making proceeding, subject to public notice and comment, with a view toward expanding seller-creditors' rights and protections.

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51/ Specifically, §73.1150 provides: (a) in transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever; (b) no license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.



## Regulatory Flexibility Act – Initial Analysis

## I. Reason for action:

Since seller-financed transactions represent one method by which minorities may acquire broadcast facilities, we are proposing to examine the protections currently available to seller-lenders with a view towards possibly expanding their protection and thereby stimulating such transactions.

## II. The objective:

To encourage seller-financed transactions as a means to facilitate the transfer of broadcast properties.

## III. Legal basis:

Authority to consider expanding seller-creditors' protection is premised upon 47 USC §310(d) which empowers the Commission to approve of transfers.

## IV. Description of potential impact and number of small entities affected:

In general, the impact of affording licensee-sellers additional protections may encourage seller-financing and thus may assist new entrants into the broadcasting industry. Established, as well as potential, broadcasters may be affected.

## V. Record keeping and other compliance requirements:

The proposal would impose no new record keeping burdens for broadcasters.

## VI. Federal rules which overlap, duplicate or conflict with these rules:

None.

## VII. Any significant alternatives minimizing impact on small entities and consistent with stated objectives:

The expansion of seller-creditor's protections would not impose any burdens upon small entities; rather it may increase small entities' opportunities to enter the broadcasting industry.

## Filing Responses to This Notice

24. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that ex parte contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a Public Notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final Order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an ex parte presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written ex parte presentation must serve a copy of that presentation on the Commission's secretary for inclusion in the public file. Any person who makes an oral ex parte presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, §1.1231 of the Commission's rules and regulations, 47 CFR §1.1231.

25. Pursuant to applicable procedures set out in §§1.4, 1.415 and 1.419 of the Commission's rules and regulations, 47 CFR §1.4, §1.415 and §1.419, interested parties may file



comments on or before January 12, 1983, and reply comments on or before January 27, 1983. \*/ All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

26. In accordance with the provisions of §1.419 of the Commission's rules and regulations, 47 CFR §1.419, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission. Members of the general public who wish to participate informally in the proceeding may submit one copy of their comments, specifying the docket number in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N. W., Washington, D. C.

27. For further information contact Ava H. Berland, Mass Media Bureau, (202) 632-7792.

STATEMENT OF CHAIRMAN MARK S. FOWLER

When I became Chairman, one of my most important goals was to create more opportunities for minorities in telecommunications. The more I studied the problem, the more I became convinced that the three major roadblocks to more minority ownership are money, money, and money. Today's actions aim squarely at the problem of financing minority opportunities. They are the result of hard work by the Advisory Committee, headed ably by my colleague, Henry Rivera.

More than anything, today's actions take a big step in the right direction in fulfilling the goal of full and fair entry into telecommunications for all Americans. By focusing on capital formation, they identify the chief problem and provide the start of a solution. No set of actions, I realize, can bring sudden equality of opportunity to the telecommunications marketplace. But by aiding entry for the minority entrepreneur, we aim our efforts in the right direction.

As President Reagan has said, the best hope for a strong economic future rests with a healthy, growing private sector. And the private sector does best when all have opportunities to enter it.

STATEMENT OF COMMISSIONER HENRY M. RIVERA

Today we take important new steps to facilitate minority acquisition of telecommunications properties. These measures are points on a continuum of FCC efforts to broaden ownership of communications facilities. 1/

Although our actions center on the mass media services, we also for the first time have proposed legislative measures to help diversify ownership of all telecommunications services within the Commission's domain. Of the actions we take today, these proposed legislative revisions could well be the most significant, at least from a long term policy perspective.

As early as 1978, this Commission stated its desire to improve minority ownership of common carrier and other nonbroadcast facilities, 2/ noting that such improvement would require the efforts of Congress, the private sector and other governmental agencies. The current Advisory Committee's Final Report expressly found that encouraging minority entry into all fields of telecommunications would enhance the public interest, 3/ and accordingly

\*/ [See Table of Dates for Filing Comments and Reply Comments (RR Finding Aids Volume) for any subsequent changes in these dates. -Ed.]

1/ See Policy Statement Regarding the Advancement of Minority Ownership in Broadcasting, \_\_\_\_\_ FCC 2d \_\_\_\_\_ (adopted December 2, 1982); Minority Ownership of Broadcasting Facilities, 68 FCC 2d 797 (1978).

2/ Minority Ownership of Broadcasting Facilities, supra, 68 FCC 2d at 984.

3/ Final Report at 7.



recommended that the FCC's tax certificate policies be extended to new non-media areas. This recommendation is readily understandable when one considers the vital role the telecommunications industries occupy in our Nation's economic, social and political arenas.

If the proposed amendment to Section 1071 is enacted, the Commission could promulgate a policy to further diversification of ownership of private radio and common carrier facilities, premised on the view that diversified ownership of communications facilities is itself a valid Commission objective.

This agency's experience with the current Section 1071 suggests that the proposed amendment would have a negligible effect on the public fisc but that its impact in promoting FCC policies could be significant. 4/

It is my sincere hope that the Congress will see fit to act favorably upon the legislative proposals we forward today.

#### CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Lest any confusion result from the attachment of legislative "proposals" to a transmittal letter which eschews making any "affirmative [legislative] recommendation," let me reiterate my belief that the "proposals" are not intended to be Commission requests for legislation. Rather, the Commission's action today merely transmits the legislative recommendations of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications and notes some of the substantial problems regarding the adoption of the proposals.

I would be particularly disturbed if the transmittal were misperceived as an FCC request for expansion of its tax certificate policy into nonbroadcast services because I feel strongly that the Commission should not support such legislation. First, our minority actions in the broadcast area have always been predicated on a communications-related purpose; the belief that increased minority participation fosters the presentation of diverse viewpoints. Indeed, it is this communications purpose which has made the Commission's EEO-related policies unique among federal regulatory agencies. E.g., *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 US 662, 670 n. 7 (1976). Because common carriers by definition do not control content, the extension of our tax certificate policy simply could not serve the communications purpose which has underlain our minority policies. It may be that such a policy will nevertheless serve a social goal which Congress wishes to foster, but I do not think it is the province of this Commission to recommend the adoption of such general social goals absent some communications purpose. This is particularly true since the evaluation of the merits of the proposed legislation rests on issues of economic policy about which this Commission has no special knowledge.

I am also fearful that implicit congressional approval of a policy of fostering minority ownership of nonbroadcast telecommunications facilities would necessarily be translated into a system of preferences in nonbroadcast hearings such as those now beginning in the cellular radio area. It seems to me that such a consequence would be difficult to avoid in light of a congressionally established policy.

Where the nexus to communications policy exists, I support making efforts to foster minority ownership. In my view, however, the Commission's authority to influence national social goals is limited quite properly to issues of communications policy. I fear that we will lessen the Commission's ability to affect legislation which is properly within its area of expertise if we engage in efforts to further goals which bear no relationship to the Commission's special mandate.

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4/ For instance, since 1978, the Commission has issued approximately 55 tax certificates in furtherance of its minority ownership policy. The stations acquired as a result represent more than thirty percent of all minority-owned commercial broadcast stations. Thus, the tax certificate program has been singularly effective in promoting this fundamental FCC objective.



APPENDIX A

ADVISORY COMMITTEE ON ALTERNATIVE FINANCING FOR MINORITY  
OPPORTUNITIES IN TELECOMMUNICATIONS

FCC Chairman Henry M. Rivera, Chairman  
Edmund H. Cardona, Special Assistant

Executive Committee

Anne P. Jones  
FCC Commissioner  
Joel L. Allbritton  
Allbritton Communications, Inc.  
Virginia A. Dwyer  
American Telephone & Telegraph Co.  
Coy Eklund  
The Equitable Life Assurance Society of the United States  
Joseph Laitin  
Private Consultant  
Charles E. Walker  
Charles E. Walker Associates, Inc.

Financial Panel

Tenney I. Deane  
First Energy Associates  
Chris Flor  
Heller-Oak Communications Corp.  
Lee M. Hague  
Hague and Company  
Ragan A. Henry  
Broadcast Enterprises National, Inc.  
Eugene D. Jackson  
National Black Network  
Joseph La Bonte  
Twentieth Century Fox Corp.  
Thomas A. Marinkovich  
Daniels and Associates  
Raul Masvidal  
Biscayne Bank  
C. Douglas Mercer II  
First National Bank of Boston  
Fernando Oaxaca  
Coronado Communications Corp.  
Marianne Camille Spraggins  
Salomon Brothers, Inc.

Policy Panel

Michael R. Gardner  
Bracewell and Patterson  
Pluria Marshall  
National Black Media Coalition  
L. E. Guzman  
Chase Manhattan Bank, N.A.  
Margita White  
Taft Broadcast Co.  
William A. Russell Jr.  
FCC Public Affairs Office  
Erwin Krasnow  
National Association of Broadcasters



Robert L. Johnson  
Black Entertainment Television

Management and Technical Assistant Panel

Victor M. Rivera  
Department of Commerce  
Brazil O'Hagan  
The WNDU Stations  
Fernando Oaxaca  
Coronado Communications Corp.  
Alex P. Mercure  
Mercure Telecommunications, Inc.

Associate Members

Eddie Pena  
National Cable Television Association  
John Oxendine  
Broadcast Capital Fund, Inc.  
Howard Stason  
Blackburn and Associates  
Donald A. Thurston  
Berkshire Broadcasting Company  
Zelbie Trogden  
Security Pacific National Bank  
Herbert P. Wilkens  
Syndicated Communications, Inc.

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