NLWJC- Kagan

Counsel - Box 018 - Folder 004

FCC Affirmative Action [4]

104TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
104–92

SELF-EMPLOYED HEALTH INSURANCE ACT

MARCH 29, 1995.—Ordered to be printed

Mr. ARCHER, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 831]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 831), to amend the Internal Revenue Code of 1986 to permanently extend the deduction for the health insurance costs of self-employed individuals, to repeal the provision permitting nonrecognition of gain on sales and exchanges effectuating policies of the Federal Communications Commission, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. PERMANENT EXTENSION AND INCREASE OF DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS.

(a) PERMANENT EXTENSION.—Subsection (l) of section 162 of the Internal Revenue Code of 1986 (relating to special rules for health insurance costs of self-employed individuals) is amended by striking paragraph (6).

(b) INCREASE IN DEDUCTION.—Paragraph (1) of section 162(l) of the Internal Revenue Code of 1986 is amended by striking "25 percent" and inserting "30 percent".

(c) EFFECTIVE DATES.—

(1) EXTENSION.—The amendment made by subsection (a) shall apply to taxable years beginning after December 31, 1993.

(2) INCREASE.—The amendment made by subsection (b) shall apply to taxable years beginning after December 31, 1994.

99–006

SEC. 2. REPEAL OF NONRECOGNITION ON FCC CERTIFIED SALES AND EXCHANGES.

(a) IN GENERAL.—Subchapter O of chapter 1 of the Internal Revenue Code of 1986 is amended by striking part V (relating to changes to effectuate FCC policy).

(b) CONFORMING AMENDMENTS.—Sections 1245(b)(5) and 1250(d)(5) of the Internal Revenue Code of 1986 are each amended—

(1) by striking "section 1071 (relating to gain from sale or exchange to effectuate polices of FCC) or", and

(2) by striking "1071 AND" in the heading thereof.

(c) CLERICAL AMENDMENT.—The table of parts for such subchapter O is amended by striking the item relating to part V.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to—

(A) sales and exchanges on or after January 17, 1995, and

(B) sales and exchanges before such date if the FCC tax certificate with respect to such sale or exchange is issued on or after such date.

(2) BINDING CONTRACTS.—

(A) IN GENERAL.—The amendments made by this section shall not apply to any sale or exchange pursuant to a written contract which was binding on January 16, 1995, and at all times thereafter before the sale or exchange, if the FCC tax certificate with respect to such sale or exchange was applied for, or issued, on or before such date.

(B) SALES CONTINGENT ON ISSUANCE OF CERTIFICATE.—

(i) IN GENERAL.—A contract shall be treated as not binding for purposes of subparagraph (A) if the sale or exchange pursuant to such contract, or the material terms of such contract, were contingent, at any time on January 16, 1995, on the issuance of an FCC tax certificate. The preceding sentence shall not apply if the FCC tax certificate for such sale or exchange is issued on or before January 16, 1995.

(ii) MATERIAL TERMS.—For purposes of clause (i), the material terms of a contract shall not be treated as contingent on the issuance of an FCC tax certificate solely because such terms provide that the sales price would, if such certificate were not issued, be increased by an amount not greater than 10 percent of the sales price otherwise provided in the contract.

(3) FCC TAX CERTIFICATE.—For purposes of this subsection, the term "FCC tax certificate" means any certificate of the Federal Communications Commission for the effectuation of section 1071 of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of this Act).

SEC. 3. SPECIAL RULES RELATING TO INVOLUNTARY CONVERSIONS.

(a) REPLACEMENT PROPERTY ACQUIRED BY CORPORATIONS FROM RELATED PERSONS.—

(1) In general.—Section 1033 of the Internal Revenue Code of 1986 (relating to involuntary conversions) is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

"(i) Nonrecognition Not To Apply if Corporation Acquires Replacement Property From Related Person.—

"(1) In general.—In the case of—

"(A) a C corporation, or

"(B) a partnership in which 1 or more C corporations own, directly or indirectly (determined in accordance with section 707(b)(3)), more than 50 percent of the capital interest, or profits interest, in such partnership at the time of the involuntary conversion,

subsection (a) shall not apply if the replacement property or stock is acquired from a related person. The preceding sentence shall not apply to the extent that the related person acquired the replacement property or stock from an unrelated person during the period described in subsection (a)(2)(B).

"(2) Related person.—For purposes of this subsection, a person is related to another person if the person bears a relationship to the other person described in section 267(b) or 707(b)(1)."

(2) Effective date.—The amendment made by paragraph (1) shall apply to involuntary conversions occurring on or after February 6, 1995.

(b) Application of Section 1033 to Certain Sales Required for Microwave Relocation.—

(1) In general.—Section 1033 of the Internal Revenue Code of 1986 (relating to involuntary conversions), as amended by subsection (a), is amended by redesignating subsection (j) as subsection (k) and by inserting after subsection (i) the following new subsection:

"(j) Sales or Exchanges To Implement Microwave Relocation Policy.—

"(1) In general.—For purposes of this subtitle, if a taxpayer elects the application of this subsection to a qualified sale or exchange, such sale or exchange shall be treated as an involuntary conversion to which this section applies.

"(2) Qualified sale or exchange.—For purposes of paragraph (1), the term 'qualified sale or exchange' means a sale or exchange before January 1, 2000, which is certified by the Federal Communications Commission as having been made by a taxpayer in connection with the relocation of the taxpayer from the 1850–1990MHz spectrum by reason of the Federal Communications Commission's reallocation of that spectrum for use for personal communications services. The Commission shall transmit copies of certifications under this paragraph to the Secretary."

(2) Effective date.—The amendment made by paragraph (1) shall apply to sales or exchanges after March 14, 1995.

SEC. 4. DENIAL OF EARNED INCOME CREDIT FOR INDIVIDUALS HAVING EXCESSIVE INVESTMENT INCOME.

(a) In General.—Section 32 of the Internal Revenue Code of 1986 is amended by redesignating subsections (i) and (j) as sub-

sections (j) and (k), respectively, and by inserting after subsection (h) the following new subsection:

"(i) DENIAL OF CREDIT FOR INDIVIDUALS HAVING EXCESSIVE INVESTMENT INCOME.—

"(1) IN GENERAL.—No credit shall be allowed under subsection (a) for the taxable year if the aggregate amount of disqualified income of the taxpayer for the taxable year exceeds $2,350.

"(2) DISQUALIFIED INCOME.—For purposes of paragraph (1), the term 'disqualified income' means—

"(A) interest or dividends to the extent includible in gross income for the taxable year,

"(B) interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

"(C) the excess (if any) of—

"(i) gross income from rents or royalties not derived in the ordinary course of a trade or business, over

"(ii) the sum of—

"(I) the deductions (other than interest) which are clearly and directly allocable to such gross income, plus

"(II) interest deductions properly allocable to such gross income."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1995.

SEC. 5. EXTENSION OF SPECIAL RULE FOR CERTAIN GROUP HEALTH PLANS.

Section 13442(b) of the Omnibus Budget Reconciliation Act of 1993 (Public Law 103–66) is amended by striking "May 12, 1995" and inserting "December 31, 1995".

SEC. 6. STUDY OF EXPATRIATION TAX.

(a) IN GENERAL.—The staff of the Joint Committee on Taxation shall conduct a study of the issues presented by any proposals to affect the taxation of expatriation, including an evaluation of—

(1) the effectiveness and enforceability of current law with respect to the tax treatment of expatriation,

(2) the current level of expatriation for tax avoidance purposes,

(3) any restrictions imposed by any constitutional requirement that the Federal income tax apply only to realized gains,

(4) the application of international human rights principles to taxation of expatriation,

(5) the possible effects of any such proposals on the free flow of capital into the United States,

(6) the impact of any such proposals on existing tax treaties and future treaty negotiations,

(7) the operation of any such proposals in the case of interests in trusts,

(8) the problems of potential double taxation in any such proposals,

(9) the impact of any such proposals on the trade policy objectives of the United States,

(10) the administrability of such proposals, and

(11) possible problems associated with existing law, including estate and gift tax provisions.

(b) REPORT.—The Chief of Staff of the Joint Committee on Taxation shall, not later than June 1, 1995, report the results of the study conducted under subsection (a) to the Chairmen of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate.

And the Senate agree to the same.

BILL ARCHER,
PHILIP CRANE,
WM. THOMAS,
CHARLES B. RANGEL,
Managers on the Part of the House.

BOB PACKWOOD,
BOB DOLE,
BILL ROTH,
JOHN H. CHAFEE,
CHUCK GRASSLEY,
DANIEL PATRICK MOYNIHAN,
MAX BAUCUS,
CAROL MOSELEY-BRAUN,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 831) to amend the Internal Revenue Code of 1986 to permanently extend the deduction for the health insurance costs of self-employed individuals, to repeal the provision permitting nonrecognition of gain on sales and exchanges effectuating policies of the Federal Communications Commission, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

A. PERMANENTLY EXTEND DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS

(Sec. 1 of the House bill, sec. 1 of the Senate amendment, sec. 1 of the conference agreement and sec. 162(l) of the Code)

Present Law

Under present law, the tax treatment of health insurance expenses depends on whether the taxpayer is an employee and whether the taxpayer is covered under a health plan paid for by the employee's employer. An employer's contribution to a plan providing accident or health coverage for the employee and the employee's spouse and dependents is excludable from an employee's income. The exclusion is generally available in the case of owners of a business who are also employees.

In the case of self-employed individuals (i.e., sole proprietors or partners in a partnership), no equivalent exclusion applies. However, prior law provided a deduction for 25 percent of the amount paid for health insurance for a self-employed individual and the individual's spouse and dependents. The 25-percent deduction was available with respect to the cost of self-insurance as well as commercial insurance. In the case of self insurance, the deduction was not available unless the self-insured plan was in fact insurance (e.g., there was appropriate risk shifting) and not merely a reimbursement arrangement. The 25-percent deduction was not available for any month if the taxpayer was eligible to participate in a subsidized health plan maintained by the employer of the taxpayer or the taxpayer's spouse. In addition, no deduction was available to the extent that the deduction exceeded the taxpayer's earned income. The amount of expenses paid for health insurance in excess of the deductible amount could be taken into account in determining whether the individual was entitled to an itemized deduction for medical expenses. The 25-percent deduction expired for taxable years beginning after December 31, 1993.

For purposes of these rules, more than 2-percent shareholders of S corporations are treated the same as self-employed individuals. Thus, they were entitled to the 25-percent deduction.

Other individuals who purchase their own health insurance (e.g., someone whose employer does not provide health insurance) can deduct their insurance premiums only to the extent that the premiums, when combined with other unreimbursed medical expenses, exceed 7.5 percent of adjusted gross income.

House Bill

The House bill would retroactively reinstate the deduction for 25 percent of health insurance costs of self-employed individuals for 1994 and would extend the deduction permanently.

Effective date.—The provision would be effective for taxable years beginning after December 31, 1993.

Senate Amendment

The Senate amendment is the same as the House bill, except that the deduction would be increased to 30 percent for years beginning after December 31, 1994.

Effective date.—The provision generally would be effective for taxable years beginning after December 31, 1993. The increase in the deduction to 30 percent of health insurance costs would be effective for taxable years beginning after December 31, 1994.

Conference Agreement

The conference agreement follows the Senate amendment.

B. Repeal of Special Rules Applicable to FCC-Certified Sales of Broadcast Property

(Sec. 2 of the House bill, sec. 2 of the Senate amendment, sec. 2 of the conference agreement, and sec. 1071 of the Code)

Present Law and Background

Tax treatment of a seller of broadcast property

General tax rules

Under generally applicable Code provisions, the seller of a business, including a broadcast business, recognizes gain to the extent the sale price (and any other consideration received) exceeds the seller's basis in the property. The recognized gain is then subject to the current income tax unless the gain is deferred or not recognized under a special tax provision.

Special rules under Code section 1033

Under Code section 1033, gain realized by a taxpayer from certain involuntary conversions of property is deferred to the extent the taxpayer purchases property similar or related in service or use to the converted property. The replacement property may be acquired directly or by acquiring control of a corporation (generally, 80 percent of the stock of the corporation) that owns replacement property. The taxpayer's basis in the replacement property generally is the same as the taxpayer's basis in the converted property, decreased by the amount of any money or loss recognized on the conversion, and increased by the amount of any gain recognized on the conversion.

Only involuntary conversions that result from destruction, theft, seizure, or condemnation (or threat or imminence thereof) are eligible for deferral under Code section 1033. In addition, the term "condemnation" refers to the process by which private property is taken from public use without the consent of the property owner but upon the award and payment of just compensation, according to a ruling by the Internal Revenue Service (IRS).[1] Thus, for example, an order by a Federal court to a corporation to divest itself of ownership of certain stock because of anti-trust rules is not a condemnation (or a threat or imminence thereof), and the divestiture is not eligible for deferral under this provision.[2] Under another IRS ruling, the "threat or imminence of condemnation" test is satisfied if, prior to the execution of a binding contract to sell the property, "the property owner is informed, either orally or in writing by a representative of a governmental body or public official authorized to acquire property for public use, that such body or official has decided to acquire his property, and from the information conveyed to him has reasonable grounds to believe that his property will be condemned if a voluntary sale is not arranged."[3] However, under

[1] Rev. Rul. 58-11, 1958-1 C.B. 273.
[2] Id.
[3] Rev. Rul. 74-8, 1974-1 C.B. 200.

this ruling, the threatened taking also must constitute a condemnation, as defined above.

Special rules under Code section 1071

Under Code section 1071, if the FCC certifies that a sale or exchange of property is necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the FCC with respect to the ownership and control of "radio broadcasting stations," a taxpayer may elect to treat the sale or exchange as an involuntary conversion. The FCC is not required to determine the tax consequences of certifying a sale or to consult with the IRS about the certification process.

Under Code section 1071, the replacement requirement in the case of FCC-certified sales may be satisfied by purchasing stock of a corporation that owns broadcasting property, whether or not the stock represents control of the corporation. In addition, even if the taxpayer does not reinvest all the sales proceeds in similar or related replacement property, the taxpayer nonetheless may elect to defer recognition of gain if the basis of depreciable property that is owned by the taxpayer immediately after the sale or that is acquired during the same taxable year is reduced by the amount of deferred gain.

Tax treatment of a buyer of broadcast property

Under generally applicable Code provisions, the purchaser of a broadcast business, or any other business, acquires a basis equal to the purchase price paid. In an asset acquisition, a buyer must allocate the purchase price among the purchased assets to determine the buyer's basis in these assets. In a stock acquisition, the buyer generally takes a basis in the stock equal to the purchase price paid, and the business retains its basis in the assets. This treatment applies whether or not the seller of the broadcast property has received an FCC certificate exempting the sale transaction from the normal tax treatment.

FCC tax certificate program

Multiple ownership policy

The FCC originally adopted multiple ownership rules in the early 1940s.[4] These rules prohibited broadcast station owners from owning more than one station in the same service area, and, generally, more than six high frequency (radio) or three television stations. Owners wishing to acquire additional stations had to divest themselves of stations they already owned in order to remain in compliance with the FCC's rules.

In November 1943, the FCC adopted a rule that prohibited duopolies (ownership of more than one station in the same city).[5] After these rules were adopted, owners wishing to acquire additional stations in excess of the national ownership limit had to divest themselves of stations they already owned in order to remain in compliance with the FCC's rules. After Code section 1071 was

[4] Fed. Reg. 2382 (June 26, 1940) (multiple ownership rules for high frequency broadcast stations); 5 Fed. Reg. 2284 (May 6, 1941) (multiple ownership rules for television stations).
[5] 8 Fed. Reg. 16065 (Nov. 23, 1943).

adopted in 1943, in some cases, parties petitioned the FCC for tax certificates pursuant to Code section 1071 when divesting themselves of stations. These divestitures were labeled "voluntary divestitures" by the FCC. When the duopoly rule was adopted, 35 licensees that held more than one license in a particular city were required by the rule "involuntarily" to divest themselves of one of the licenses.[6]

Minority ownership policy

In 1978, the FCC announced a policy of promoting minority ownership of broadcast facilities by offering an FCC tax certificate to those who voluntarily sell such facilities (either in the form of assets or stock) to minority individuals or minority-controlled entities.[7] The FCC's policy was based on the view that minority ownership of broadcast stations would provide a significant means of fostering the inclusion of minority views in programming, thereby serving the needs and interests of the minority community as well as enriching and educating the non-minority audience. The FCC subsequently expanded its policy to include the sale of cable television systems to minorities as well.[8]

"Minorities," within the meaning of the FCC's policy, include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders."[9] As a general rule, a minority-controlled corporation is one in which more than 50 percent of the voting stock is held by minorities. A minority-controlled limited partnership is one in which the general partner is a minority or minority-controlled, and minorities have at least a 20-percent interest in the partnership.[10] The FCC requires those who acquire broadcast properties with the help of the FCC tax certificate policy to hold those properties for at least one year.[11] An acquisition can qualify even if there is a pre-existing agreement (or option) to buy out the minority interests at the end of the one-year holding period, providing that the transaction is at arm's-length.

In 1982, the FCC further expanded its tax certificate policy for minority ownership. At that time, the FCC decided that, in addition to those who sell properties to minorities, investors who contribute to the stabilization of the capital base of a minority enterprise would be entitled to a tax certificate upon the subsequent sale of their interest in the minority entity.[12] To qualify for an FCC tax certificate in this circumstance, an investor must either (1) provide start-up financing that allows a minority to acquire either broadcast or cable properties, or (2) purchase shares in a minority-controlled entity within the first year after the license necessary to operate the property is issued to the minority. An investor can qualify

[6] FCC Announces New Policy Relating to Issuance of Tax Certificates, 14 FCC2d 827 (1956).
[7] Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978).
[8] Minority Ownership of Cable Television Systems, 52 R.R.2d 1469 (1982).
[9] 52 R.R.2d at n. 1.
[10] Commission's Policy Regarding the Advancement of Minority Ownership in Broadcasting, Policy Statement, and Notice of Proposed Rulemaking, 92 FCC2d 853–855 (1982).
[11] See Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), 57 R.R.2d 1149 (1985). Anti-trafficking rules require cable properties to be held for at least three years (unless the property is sold pursuant to a tax certificate).
[12] Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849 (1982).

for a tax certificate even if the sale of the interest occurs after participation by a minority in the entity has ceased. In these situations, the status of the divesting investor and the purchaser of the divested interest is irrelevant, because the goal is to increase the financing opportunities available to minorities.

Personal communications services ownership policy

In 1993, Congress provided for the orderly transfer of frequencies, including frequencies that can be licensed pursuant to competitive bidding procedures.[13] The FCC has adopted rules to conduct auctions for the award of more than 2,000 licenses to provide personal communications services ("PCS"). PCS will be provided by means of a new generation of communication devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multichannel cordless phones, and advanced paging devices with two-way data capabilities. The PCS auctions (which began last year) will constitute the largest auction of public assets in American history and are expected to generate billions of dollars for the United States Treasury.[14]

The FCC has designed procedures to ensure that small businesses, rural telephone companies and businesses owned by women and minorities have "the opportunity to participate in the provision" of PCS, as Congress directed in 1993.[15] To help minorities and women participate in the auction of the PCS licenses, the FCC took several steps including up to a 25-percent bidding credit, a reduced upfront payment requirement, a flexible installment payment schedule and an extension of the tax certificate program for businesses owned by minorities and women.[16]

The FCC will employ the tax certificate program in three ways: (1) initial investors (who provide "start-up" financing or purchase interests within the first year after license issuance) in minority and woman-owned PCS businesses will be eligible for FCC tax certificates upon the sale of their investments; (2) holders of PCS licenses will be able to obtain FCC tax certificates upon the sale of the business to a company controlled by minorities and women; and (3) a cellular operator that sells its interest in an overlapping cellular system to a minority or a woman-owned business to come into compliance with the FCC PCS/cellular cross-ownership rule will be eligible for a tax certificate. In addition, as discussed below, the FCC will issue tax certificates for PCS to encourage fixed microwave operators voluntarily to relocate to clear a portion of the spectrum for PCS technologies.

Microwave relocation policy

PCS can operate only on frequencies below 3GHz. However, because that frequency range is currently occupied by various private fixed microwave communications systems (such as railroads, oil pipelines, and electric utilities), there are no large blocks of unallocated spectrum available to PCS. To accommodate PCS, the

[13] Omnibus Budget Reconciliation Act of 1993, P.L. 103–66, Title VI.
[14] Fifth Report and Order, 9 FCC Rcd 5532 (1994).
[15] Omnibus Budget Reconciliation Act of 1993, P.L. 103–66, section 6002(a).
[16] Installment payments are available to small businesses and rural telephone companies.

FCC has reallocated the spectrum; the 1850–1990MHz spectrum will be used for PCS, and the microwave systems will be required to move to higher frequencies. Current occupants of the 1850–1990MHz spectrum allocated to PCS must relocate to higher frequencies not later than three years after the close of the bidding process.[17] In accordance with FCC rules, these current occupants have the right to be compensated for the cost of replacing their old equipment, which can operate only on the 1850–1990MHz spectrum, with equipment that will operate at the new, higher frequency. At a minimum, the winners of the new PCS licenses must pay for and install new facilities to enable the incumbent microwave operators to relocate. The amount of these payments and characteristics of the new equipment will be the subject of negotiation between the incumbent microwave operators and the PCS licensees; thus, the nature of the compensation (i.e., solely replacement equipment, or a combination of replacement equipment plus a cash payment) is unknown at present. If no agreement is reached within the 3-year voluntary negotiation period, the microwave operators will be required by the FCC to vacate the spectrum; however, the timing of such relocation is uncertain because the relocation would take place only after completion of a formal negotiation process in which the FCC would be a participant.

The FCC will employ the tax certificate program for PCS to encourage fixed microwave operators voluntarily to relocate from the 1850–1990 MHz band to clear the band for PCS technologies.[18] Tax certificates will be available to incumbent microwave operators that relocate voluntarily within three years following the close of the bidding process. Thus, the certificates are intended to encourage such occupants to relocate more quickly than they otherwise would and to clarify the tax treatment of such transactions.[19]

Congressional appropriations rider

Since fiscal year 1988, in appropriations legislation, the Congress has prohibited the FCC from using any of its appropriated funds to repeal, to retroactively apply changes in, or to continue a reexamination of its comparative licensing, distress sale and tax certificate policies.[20] This limitation has not prevented an expansion of the existing program.[21] The current rider will expire at the end of the 1995 fiscal year, September 30, 1995.

House Bill

The House bill would repeal Code section 1071. Thus, a sale or exchange of broadcast properties would be subject to the same

[17] The PCS auctions for the 1850–1990MHz spectrum commenced in December, 1994.

[18] See, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

[19] The transaction between the PCS licensee and the incumbent microwave operator might qualify for tax-free treatment as a like-kind exchange under Code section 1031 or as an involuntary conversion under Code section 1033. However, the availability of deferral under these Code provisions may be uncertain in certain circumstances. For example, it may be unclear whether the transaction would qualify as an involuntary conversion under currently applicable IRS standards.

[20] Pub. L. No. 100–202 (1987).

[21] The appropriations restriction "does not prohibit the agency from taking steps to create greater opportunity for minority ownership." H. Rept. No. 103–708 (Conf. Rept.), 103d Cong. 2d Sess. 40 (1994).

tax rules applicable to all other taxpayers engaged in the sale or exchange of a business.

Effective date.—The repeal of section 1071 would be effective for (1) sales or exchanges on or after January 17, 1995, and (2) sale or exchanges before that date if the FCC tax certificate with respect to the sale or exchange is issued on or after that date. The provision would not apply to taxpayers who have entered into a binding written contract (or have completed a sale or exchange pursuant to a binding written contract) before January 17, 1995, and who have applied for an FCC tax certificate by that date. A contract would be treated as not binding for this purpose if the sale or exchange pursuant to the contract (or the material terms of the contract) were contingent on January 16, 1995, on issuance of an FCC tax certificate. A sale or exchange would not be contingent on January 16, 1995, on issuance of an FCC tax certificate if the tax certificate had been issued by the FCC by that date.

Senate Amendment

The Senate amendment is the same as the House bill.

Conference Agreement

The conference agreement follows the House bill and the Senate amendment with a clarification that the material terms of an otherwise binding contract in effect on January 16, 1995, would not be treated as contingent on the issuance of an FCC tax certificate solely because the contract provides that the sales price is increased by an amount not greater than 10 percent of the sales price in the event an FCC tax certificate is not issued.

C. Modification of Code Section 1033

(Sec. 3 of the House bill, sec. 3 of the Senate amendment, sec. 3 of the conference agreement, and sec. 1033 of the Code)

Present Law

As described above (item B), under Code section 1033, gain realized by a taxpayer from certain involuntary conversions of property is deferred to the extent the taxpayer purchases property similar or related in service or use to the converted property within a specified period.

Under rulings issued by the IRS to taxpayers, property (stock or assets) purchased from a related person may, in some cases, qualify as property similar or related in service or use to the converted property.[22] Thus, in certain circumstances, related taxpayers may obtain significant (and possible indefinite or permanent) tax deferral without any additional cash outlay to acquire new properties. In cases in which a taxpayer purchases stock as re-

[22] See, e.g., PLR 8132072, PLR 8020069. Private letter rulings do not have precedential authority and may not be relied upon by any taxpayer other than the taxpayer receiving the ruling but are some indication of IRS administrative practice.

placement property, section 1033 permits the taxpayer to reduce basis of stock, but does not require any reduction in the basis of the underlying assets. Thus, the reduction in basis of stock does not result in reduced depreciation deductions.

House Bill

Under the House bill, a taxpayer would not be entitled to defer gain under Code section 1033 when the replacement property or stock is purchased from a related person. For purposes of the bill, a person would be treated as related to another person if the relationship between the persons would result in a disallowance of losses under the rules of Code section 267 or 707(b). The provision would be intended to apply to all cases involving relationships to the taxpayer described in Code section 267(b) or 707(b)(1), including members of controlled groups under Code section 267(f).

Effective date.—The provision would apply to replacement property or stock acquired on or after February 6, 1995.

Senate Amendment

Related-party transactions

Under the Senate amendment, subchapter C corporations would not be entitled to defer gain under Code section 1033 if the replacement property or stock is purchased from a related person. A person would be treated as related to another person if the person bears a relationship to the other person described in Code section 267(b) or 707(b)(1). An exception to the general rule would provide that a taxpayer could purchase replacement property or stock from a related person and defer gain under Code section 1033 to the extent the related person acquired the replacement property or stock from an unrelated person within the period prescribed under Code section 1033. Thus, property acquired from outside the group within the period prescribed by section 1033 and retransferred to the taxpayer member of the group within the prescribed time period, would qualify in the hands of the taxpayer to the extent that the property's basis or other net tax consequences to the group do not change as a result of the transfer.

Microwave relocation transactions

The Senate amendment would provide that sales or exchanges that are certified by the FCC as having been made by a taxpayer in connection with the relocation of the taxpayer from the 1850–1990MHz spectrum by reason of the FCC's reallocation of that spectrum for use for PCS would be treated as involuntary conversions to which Code section 1033 applies.

Effective date

The provision prohibiting the purchase of qualified replacement property from a related party would apply to involuntary conversions occurring on or after February 6, 1995.

The provision treating certain microwave relocation transactions as involuntary conversions would apply to sales or exchanges occurring before January 1, 2000.

Conference Agreement

The conference agreement follows the Senate amendment with a modification to provide that the amendments made to section 1033 will apply not only to C corporations, but also to certain partnerships. Specifically, the provision will apply to a partnership if more than 50 percent of the capital interest, or profits interest, of the partnership are owned, directly or indirectly (as determined under section 707(b)(3)), by C corporations at the time of the involuntary conversion. If the provision applies to a partnership under the above rule, the provision would apply to all partners of the partnership, including partners that are not C corporations. If a partnership is not described by the above rule, none of the partners of the partnership will be subject to the provision by reason of their interest in the partnership.

In addition, the conference agreement clarifies that the determination of whether or not a partnership is related to another party will be made at the partnership level.

D. Unearned Income Test for Earned Income Tax Credit

(Sec. 4 of the House bill, sec. 4 of the Senate amendment, sec. 4 of the conference agreement, and sec. 32 of the Code)

Present Law

Eligible low-income workers are able to claim a refundable earned income tax credit (EITC). The amount of the credit an eligible taxpayer may claim depends upon whether the taxpayer has one, more than one, or no qualifying children and is determined by multiplying the credit rate by the taxpayer's earned income up to an earned income threshold. The maximum amount of the credit is the product of the credit rate and the earned income threshold. For taxpayers with earned income (or adjusted gross income, if greater) in excess of the phaseout threshold, the credit amount is reduced by the phaseout rate multiplied by the amount of earned income (or adjusted gross income, if greater) in excess of the phaseout threshold. The credit is not allowed if earned income (or adjusted gross income, if greater) exceeds the phaseout limit. There is no additional limitation on the amount of unearned income that the taxpayer may receive.

The parameters for the EITC depend upon the number of qualifying children the taxpayer claims. For 1995, the parameters are as follows:

	Two or more qualifying children—	One qualifying child—	No qualifying children—
Credit rate	36.00%	34.00%	7.65%
Phaseout rate	20.22%	15.98%	7.65%
Earned income threshold	$8,640	$6,160	$4,100

	Two or more qualifying children—	One qualifying child—	No qualifying children—
Maximum credit	$3,110	$2,094	$314
Phaseout threshold	$11,290	$11,290	$5,130
Phaseout limit	$26,673	$24,396	$9,230

The earned income threshold and the phaseout threshold are indexed for inflation; because the phaseout limit depends on those amounts, the phaseout rate, and the credit rate, the phaseout limit will also increase if there is inflation. Earned income consists of wages, salaries, other employee compensation, and net self-employment income.

The credit rates and phaseout rates for the EITC change over time under present law. For 1996 and after, the credit rate will be 40 percent and the phaseout rate will be 21.06 percent for taxpayers with two or more qualifying children. The credit rate and the phaseout rate for taxpayers with one qualifying child or no qualifying children will be the same as those listed in the table above.

In order to claim the EITC, a taxpayer must either have a qualifying child or must meet other requirements. A qualifying child must meet a relationship test, an age test, and a residence test. In order to claim the EITC without a qualifying child, a taxpayer must not be a dependent and must be over age 24 and under age 65.

House Bill

Under the House bill, a taxpayer would not be eligible for the EITC if the aggregate amount of interest and dividends includible in the taxpayer's income for the taxable year exceeds $3,150. The otherwise allowable EITC amount would be phased out ratably for taxpayers with aggregate taxable interest and dividend income between $2,500 and $3,150. For taxable years beginning after 1996, the $2,500 threshold and the $650 size of the phaseout would be indexed for inflation with rounding to the nearest multiple of $10.

Effective date.—The provision would be effective for taxable years beginning after December 31, 1995.

Senate Amendment

Under the Senate amendment, a taxpayer would not be eligible for the EITC if the aggregate amount of "disqualified income" of the taxpayer for the taxable year exceeds $2,450. Disqualified income would be the sum of:

(1) interest (whether or not subject to tax) received or accrued in the taxable year,

(2) dividends to the extent includible in gross income for the taxable year, and

(3) net income (if greater than zero) from rents and royalties not derived in the ordinary course of business.

Effective date.—Same as the House bill.

Conference Agreement

The conference agreement provides that a taxpayer is not eligible for the EITC if the aggregate amount of "disqualified income" of the taxpayer for the taxable year exceeds $2,350. Disqualified income is the sum of:

(1) interest and dividends includible in gross income for the taxable year,

(2) tax-exempt interest received or accrued in the taxable year, and

(3) net income (if greater than zero) from rents and royalties not derived in the ordinary course of business.

Tax-exempt interest is defined as amounts required to be reported on the taxpayer's return under Code section 6012(d).

Effective date.—The provision is effective for taxable years beginning after December 31, 1995.

E. Extension of Rule for Certain Group Health Plans

(Sec. 5 of the conference agreement and sec. 162(n) of the Code)

Present Law

In general, present law disallows employer deductions for any amounts paid or incurred in connection with a group health plan if the plan fails to reimburse hospitals for inpatient services provided in the State of New York at the same rate that licensed commercial insurers are required to reimburse hospitals for inpatient services of individuals not covered by a group health plan. This provision applies with respect to inpatient hospital services provided to participants after February 2, 1993, and on or before May 12, 1995.

House Bill

No provision.

Senate Amendment

No provision.

Conference Agreement

The conference agreement extends the present-law deduction disallowance for expenses in connection with certain group health plans through December 31, 1995.

Effective date.—The provision is effective on the date of enactment.

F. Imposition of Tax on U.S. Citizens Who Relinquish Citizenship

(Sec. 5 of the Senate amendment, sec. 6 of the conference agreement, proposed new sec. 877A, and secs. 877 and 7701 of the Code)

Present Law

U.S. citizens and residents generally are subject to U.S. income taxation on their worldwide income. The United States imposes tax on gains recognized by foreign persons that are attributable to dispositions of interests in U.S. real property. Distributions, including lump-sum distributions, that foreign persons receive from qualified U.S. retirement plans generally are subject to U.S. tax at a 30-percent rate.

A U.S. citizen who relinquishes U.S. citizenship with a principal purpose to avoid Federal tax may be subjected to an alternative taxing method for 10 years after expatriation (sec. 877). Under this alternative method, the expatriate generally is taxed on his U.S. source income (net of certain deductions), as well as on certain business profits, at rates applicable to U.S. citizens and residents.

The United States imposes its estate tax on the worldwide estates of persons who were citizens or domiciliaries of the United States at the time of death, and on certain property belonging to nondomiciliaries of the United States which is located in the United States at the time of their death. The U.S. gift tax is imposed on all gifts made by U.S. citizens and domiciliaries, and on gifts of property made by nondomiciliaries where the property is located in the United States at the time of the gift. Special rules apply to the estate and gift tax treatment of individuals who relinquished their U.S. citizenship within 10 years of death or gift, if the individual's loss of U.S. citizenship has as one of its principal purposes a tax avoidance motive.

House Bill

No provision.

Senate Amendment

Under the Senate amendment, a U.S. citizen who relinquishes citizenship generally would be treated as having sold all of his property at fair market value immediately prior to the expatriation. Gain or loss from the deemed sale would be recognized at that time, generally without regard to other provisions of the Code. Net gain on the deemed sale would be recognized under the bill only to the extent it exceeds $600,000 ($1.2 million in the case of married individuals filing a joint return, both of whom expatriate).

Property treated as sold by an expatriating citizen under the provision would include all items that would be included in the individual's gross estate under the Federal estate tax if such individual were to die on the day of the deemed sale, plus certain trust interests that are not otherwise includible in the gross estate and other interests that may be specified by the Treasury Department in order to carry out the purposes of the provision.

Certain types of property generally would not be taken into account for purposes of determining the expatriation tax: U.S. real property interests, interests in qualified retirement plans (other than interests attributable to excess contributions or contributions that violate any condition for tax-favored treatment), and, under regulations, interests in foreign pension plans and similar retirement plans or programs (up to a maximum amount of $500,000).

Under the amendment, an expatriate who is a beneficiary of a trust would be deemed to own a separate trust consisting of the assets allocable to his share of the trust, in accordance with his interest in the trust. The separate trust would be treated as selling its assets for fair market value immediately before the beneficiary relinquishes his citizenship, and distributing all resulting income and corpus to the beneficiary.

Under the amendment, a U.S. citizen who renounces his U.S. nationality before a diplomatic or consular officer of the United States would be treated as having relinquished his citizenship on that date, provided that the renunciation is later confirmed by the issuance of a certificate of loss of nationality ("CLN") by the U.S. Department of State. A U.S. citizen who furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an expatriating act would be treated as having relinquished his citizenship on the date such statement is so furnished, provided that the voluntary relinquishment is later confirmed by the issuance of a CLN. Any other U.S. citizen to whom the Department of State issues a CLN would be treated as having relinquished his citizenship on the date the CLN is issued to the individual. A naturalized citizen is treated as having relinquished his citizenship on the date a court of the United States cancels his certificate of naturalization.

Under the amendment, an individual who is subject to the tax on expatriation would be required to pay a tentative tax equal to the amount of tax that would have been due based on a hypothetical short tax year that ended on the date the individual relinquished his citizenship. The tentative tax would be due on the 90th day after the date of relinquishment.

The amendment would provide that the time for the payment of the tax on expatriation may be extended for a period not to exceed 10 years at the request of the taxpayer, as provided by section 6161.

The amendment would authorize the Treasury Department to issue regulations to permit a taxpayer to allocate the taxable gain (net of any applicable exclusion) to the basis of assets taxed under this provision, thereby preventing double taxation if the assets remain subject to U.S. tax jurisdiction.

Effective date.—The amendment would be effective for U.S. citizens who relinquish their U.S. citizenship (as determined under the provision) on or after February 6, 1995. The tentative tax would not be required to be paid until 90 days after the date of enactment.

Present law would continue to apply to U.S. citizens who relinquished their citizenship prior to February 6, 1995.

Conference Agreement

The conference agreement does not include the Senate amendment.

The conference agreement, however, directs that the staff of the Joint Committee on Taxation undertake a study of the issues presented by any proposals to affect the tax treatment of expatriation, including an evaluation of (1) the effectiveness and enforceability of current law with respect to the tax treatment of expatriation, (2) the current level of expatriation for tax avoidance purposes, (3) any restrictions imposed by any constitutional requirement that Federal income tax apply only to realized gains, (4) the application of international human rights principles to the taxation of expatriation, (5) the possible effects of any such proposals on the free flow of capital into the United States, (6) the impact of any such proposals on existing tax treaties and future treaty negotiations, (7) the operation of any such proposals in the case of interests in trusts, (8) the problems of potential double taxation in any such proposals, (9) the impact of any such proposals on the trade policy objectives of the United States, (10) the administrability of such proposals, and (11) possible problems associated with existing law, including estate and gift tax provisions. The results of such study are to be reported to the Chairman of the House Committee on Ways and Means and to the Chairman of the Senate Committee on Finance by June 1, 1995.

ESTIMATED REVENUE EFFECTS OF H.R. 831 AS AGREED TO BY HOUSE AND SENATE CONFEREES—FISCAL YEARS 1995–2005

[Millions of Dollars]

Provision	Effective	1995	1996	1997	1998	1999	2000	1995–00	2001–05	1995–05
1. Extend self-employed health deduction: 25% for 1994 and 30% thereafter.	tyba Dec. 31, 1993	−514	−482	−527	−587	−649	−708	−3,467	−4,520	−7,987
2. Repeal section 1071 (FCC tax certificate program with transition).	Jan. 17, 1995	303	379	135	135	170	201	1,323	1,465	2,786
3. Modify section 1033 for corporations with transition rule for microwave relocation previously entitled to section 1071 (nonrecognition of gain on involuntary conversions not to apply to acquisitions from related persons).	Feb. 6, 1995	5	9	23	33	47	67	184	505	689
4. Deny earned income tax credit to individuals with interest, dividends, tax-exempt interest income, and net rental and royalty income over $2,350 (the threshold is not indexed for inflation)[1].	Jan. 1, 1996	....	22	436	487	521	556	2,023	3,515	5,538
5. Extension of rule for certain group health plans.	DoE	−42	−11	....	....	....	....	−53	....	−53
Net totals		−248	−83	67	68	89	116	10	965	975

[1] Included in this estimate are decreases in EITC outlays of $18 million for FY 1996, $353 million for FY 1997, $397 million for FY 1998, $426 million for FY 1999, $449 million for FY 2000, $495 million for FY 2001, $529 million for FY 2002, $566 million for FY 2003, $605 million for FY 2004, and $647 million for FY 2005.

Note.—Details may not add to totals due to rounding. Legend for "Effective" column: tyba=taxable years beginning after. DoE=date of enactment.

Source: Joint Committee on Taxation.

BILL ARCHER,
PHILIP CRANE,
WM. THOMAS,
CHARLES B. RANGEL,
Managers on the Part of the House.
BOB PACKWOOD,
BOB DOLE,
BILL ROTH,
JOHN H. CHAFEE,
CHUCK GRASSLEY,
DANIEL PATRICK MOYNIHAN,
MAX BAUCUS,
CAROL MOSELEY-BRAUN,
Managers on the Part of the Senate.

Pending Applications for Tax Certificates
As of 3/23/95

RADIO

Applicant	Station	Type of Certificate	Sale Price	Date Filed
Michael Glinter	WTNX(AM), Lynchburg, TN	AM Band	Not stated	4/2/93
Transcontinental Broadcasting, Inc.	KPRR-FM, El Paso, TX	Seller	$750,000	9/27/94
Keymarket of Los Angeles, Inc.	KNAC-FM, Long Beach, FL	Seller	$13,000,000	11/2/94; granted 2/15/95
1310, Inc.	KDIA(AM), Oakland, CA	Seller	$2,000,000	11/29/94
Design Media, Inc.	WQUL-FM, Griffin, GA	Seller	$4,500,000	12/15/94; granted 3/3/95
Mount Wilson Broadcasters, Inc.	KSUR-FM, Greenfield, CA	Seller	$925,000	12/2/94
Mountain Broadcasting, Inc.	KTOT-FM, Big Bear Lake, CA	Seller	$750,000	12/14/94
Maranatha Broadcasting, Inc.	WFMZ-FM, Allentown, PA	Multiple Own.	$9,500,000	12/15/94; granted 2/17/95
Ridgefield Broadcasting Corp.	WREF(AM), Ridgefield, CT	Seller	$650,000	1/6/95
Baycom San Jose, L.P.	KSJX(AM), San Jose, CA	Seller	$2,100,000	1/27/95
Antelope Broadcasting, Inc.	WCLY(AM), Raleigh, NC	Seller	$240,000	1/31/95; granted 2/16/95
Desert West Air Ranchers Corp.	KZLZ-FM, Kearny, AZ	Seller	$750,000	2/14/95
Caballero Radio West, Inc.	KSUV/KXEM/KZBA (AM) Bakersfield, CA	Seller	$1,500,000	3/2/95
Red Top Broadcasting Corp.	WSUA(AM), Miami, FL	Seller	$2,750,000	3/17/95

Subtotal: 10 applications pending; 4 granted

Pending Applications for Tax Certificates
3/23/95
(continued)

TELEVISION

Applicant	Station	Type of Certificate	Sale Price	Date Filed
William C. De La Pena	WDLP, Miami, FL	Investor	$3,600,000	12/23/93
Clarence V. McKee	WTVT, Tampa, FL	Reinvestment	$900,000	10/4/93
Lewis Broadcasting Corp.	WLTZ, Columbus, GA	Seller	$4,300,000	6/2/94
Shareholders of Pueblo Broadcasting, Inc.	KXLN, Rosenberg, TX	Investor	Not stated	11/16/94
Warner Communications, Inc.	WNOL, New Orleans, LA	Investor	$17,000,000	12/14/94
Fox Television Stations, Inc.	WATL, Atlanta, GA	Seller	$150,000,000	12/14/94
Busse Broadcasting Corp.	WMMT, Kalamazoo, MI	Seller	$95,000,000	1/11/95
The Ulloa Group	KFWD, Fort Worth, TX	Investor	Not stated	3/1/95

Subtotal: 8 applications pending

Pending Applications for Tax Certificates
3/23/95
(continued)

Cable Television

Applicant	Community	Type of Certificate	Sale Price	Date Filed
Garden State Cablevision, Inc.	Audubon, NJ	Investor	$25,360,000[1]	11/3/94
W.K. Communications, Inc.	Various systems in Arkansas, Kansas and Missouri	Seller	Not stated	11/23/94
Scholastic, Inc.	N/A; seeks tax certificate for investment in minority-controlled cable programmer	Extension[2]	Not stated	11/18/94
Bruce E. Kline	N/A; investor tax certificate request	Investor	Not stated	12/19/94
CableSouth, Inc.	Cable systems in Alabama	Seller	Not stated	1/13/95
Time Warner Entertainment Co., L.P.	Cable systems in Arkansas	Seller	$63,600,000	1/31/95
Peachtree Cable TV, Inc.	Cable systems in Georgia	Seller	Not stated	2/1/95
Viacom International, Inc.	Cable systems in San Francisco Bay area; Northern California; Seattle-Tacoma, WA; Dayton, OH; Salem, OR; & Nashville, TN	Seller	Not stated	2/3/95

Subtotal: 8 applications pending

Grand Total: 26 tax certificate applications are currently pending for the radio, television and cable services.

---

[1] The amount of start up capital contributed by the tax certificate applicant was $25,360,000. The price at which the investors' interests were sold is unknown.

[2] Scholastic filed a petition for declaratory ruling requesting that the Commission extend its tax certificate policy to include cable programmers. The current policy covers cable operators.

Distress Sales, 1978-1995

1978: 0

1979: 3

1980: 22

1981: 2

1982: 0

1983: 0

1984: 6

1985: 2

1986: 2

1987: 0

1988: 1

1989: 0

1990: 0

1991: 0

1992: 2

1993: 6

1994: 1

1995: 1

Total: 48

8 YLLPR 380
8 Yale L. & Pol'y Rev. 380
8 Yale L. & Pol'y Rev. 380
(Publication page references are not available for this document.)
Current Topics in Law and Policy

ARE MINORITY PREFERENCES NECESSARY? ANOTHER LOOK AT THE RADIO BROADCASTING INDUSTRY

Yale Law School

1990

Akosua Barthwell Evans

The fate of minority preference programs is one of the major civil rights policy questions that will be determined in the 1990s. The merits of these minority preference programs have become increasingly controversial; debate has raged in the media, in the legislatures, and in the courts. [FN1] Proponents claim that these policies are responsible for tremendous progress in minority employment and business ownership and therefore are necessary to reverse entrenched patterns of racial discrimination that the marketplace has failed to ameliorate. [FN2] Critics argue that the programs are overbroad and superfluous since there is no evidence of specific discrimination. They add that the programs benefit only "rich minorities,"' and result in sham transactions. [FN3] Consequently, these critics contend that the programs are ineffective. [FN4]

Some of the preference programs were developed in the late 1960s in response to the Kerner Commission report, which recommended policies to encourage greater employment and business development for minority groups historically left out of the economic mainstream. [FN5] This led to a number of new programs that either set aside opportunities or assigned a "plus factor"' to minorities. [FN6] For example, noting the Kerner Commission's criticism of the media for failing to cover or accurately portray the African-American community, [FN7] the FCC initially responded by developing "race neutral"' policies to encourage minority employment and to require broadcasters to ascertain the needs of various community groups to ensure that diverse views would be broadcast. [FN8] However, as both the courts and the Commission came to realize, neither the equal employment opportunity ("EEO"') nor the ascertainment policies were solving the problem of minority underrepresentation. [FN9] Consequently, the FCC began developing minority preference policies to encourage minority ownership by awarding "qualitative enhancements"' for minority ownership in comparative licensing hearings; [FN10] issuing tax certificates that permit the seller of a broadcast facility to defer capital gains taxation when selling to minority-owned or controlled groups; [FN11] and permitting licensees designated for a revocation hearing to sell their licenses to a minority-controlled group at a distress sale price, which can be no more than 75% of the fair market value. [FN12]

The FCC's minority preference programs have faced numerous constitutional challenges in the courts. [FN13] Challengers have claimed that the minority preference policies are unconstitutional because: (1) there is no evidence of racial discrimination in the broadcasting industry; [FN14] (2) programming diversity is not clearly a compelling government interest which justifies the use of racial classifications; [FN15] (3) there is no proven nexus between program diversity and minority ownership; [FN16] (4) the policies are not narrowly tailored and have not resulted in greater minority ownership; [FN17] and (5) the policies violate the equal protection rights of non- minorities. [FN18] Studies that clarify these policy issues are particularly important today since one of the lingering impacts of the Reagan Administration has been the assumption that the marketplace, rather than affirmative government policies, provides the most effective means of placing minorities in the economic mainstream. [FN19] Moreover, courts, when analyzing the constitutionality of minority preference or set-aside programs, have indicated that there is a lack of data justifying that these policies are needed. [FN20]

Since most commentators have focused on constitutional issues when analyzing the FCC's minority preference programs, [FN21] this Current Topic will present another perspective by testing the validity of some of the general criticisms of minority preference programs within the context of the experience of African-American radio broadcasters. To determine whether minority broadcasters encounter discrimination in the acquisition and operation of their stations, and whether there is a nexus between minority ownership and diverse programming, I interviewed twenty African-American broadcasters who collectively own approximately 30% of all African-American-owned radio stations in the United States. [FN22]

Section One of this Current Topic analyzes the minority preference programs of the FCC within the policy context of carrying out two compelling government interests: remedying past discrimination and ensuring diverse viewpoints on the public airwaves. Section Two discusses the methodology and the sample group used in the study. Section Three analyzes the obstacles, based on the survey results, often faced by African-Americans in acquiring and operating radio broadcast facilities. Section Four analyzes the nexus between minority ownership and diverse programming using the results of the survey and other studies. Section Five analyzes the impact of the policies on increasing minority ownership of radio broadcast facilities, and makes some preliminary recommendations which might prevent the abuses that occur in sham transactions. Section Six concludes that the policies have been effective.

This Current Topic makes three arguments based on the survey findings. First, many African-Americans have encountered obstacles in their attempts to acquire and operate radio stations, which may result from racial discrimination. Second, African-American broadcasters are likely to offer diverse programming either directly by targeting their program format toward African-American audiences, or indirectly, by including public service information pertinent to minorities even when their stations are not ethnically formatted. Their ownership is also likely to result in other benefits to African-Americans such as increased accessibility to community organizations and beneficial employment and purchasing policies. Finally, the minority preference policies have been effective in increasing African-American ownership of broadcasting facilities.

I. The FCC's Minority Ownership Policies

A. Diversification Doctrine

The FCC has rationalized its minority ownership policies as part of its public interest mandate to protect the First Amendment rights of the American public by ensuring that the public airwaves contain diverse viewpoints. [FN23] This diversification doctrine has developed over the years both by statute and through the courts. The FCC is empowered by the Communications Act of 1934 to issue licenses to broadcasters and to make rules and regulations "as public convenience, interest, or necessity requires."' [FN24] However, the Communications Act does not specifically define "public interest."' The courts have construed the public interest mandate to mean that the FCC must guard the First Amendment rights of the American public by ensuring the broadcasting of diverse viewpoints. [FN25] Although in earlier decisions courts have rationalized the need for program diversity based on the scarcity of broadcasting frequencies, [FN26] recently in Syracuse Peace Council v. FCC [FN27] the United States Court of Appeals for the District of Columbia upheld the FCC's decision that the fairness doctrine no longer served the public interest, since the growth in broadcast outlets eliminated the need for the doctrine. Although some have cited the Syracuse decision as proof that policies promoting minority ownership diversity must also be considered unnecessary, [FN28] the FCC has rejected this interpretation and stated that the demise of the fairness doctrine has no impact on current minority ownership policies. [FN29]

B. Expressions of Minority Viewpoints: Race Neutral Policies

Although the diversification doctrine initially emphasized the importance of broadcasting diverse opinions in order to protect the First Amendment rights of the American public in general, after the mid-1960s and early 1970s a new dimension was added: the importance of expressing minority viewpoints specifically. As a result of social and political pressures, the FCC sought to ensure the inclusion of minority viewpoints with two race-neutral policies: improving minority employment opportunities and ascertainment.

Beginning in 1968, the FCC's EEO requirements mandated broadcasters to comply with specific EEO guidelines, [FN30] and to submit an affirmative action program. Failure to comply with these requirements could affect a broadcaster's ability to renew his license. [FN31]

The ascertainment policy, initiated in 1971, required broadcasters to consult with community leaders to determine issues of concern. [FN32] Broadcasters were required to submit information from their ascertainment surveys when they applied for license renewal. [FN33]

However, it became increasingly obvious that neither these race neutral policies [FN34] nor the marketplace were solving the problems of minority underrepresentation in the broadcasting industry. [FN35] In both 1977 and 1979, the United States Commission on Civil Rights released studies that documented the serious underrepresentation and stereotyping of women and minorities on prime time television. [FN36] Six years after the FCC's EEO policies were implemented, African-Americans and other minorities still held a small percentage of management jobs in the broadcast industry. In 1977, according to Window Dressing II, while 64.9% of the management positions at forty selected television stations were held by white males, only 5.2% and 4.4% were held by African-American males and African-American females respectively. [FN37] The track record for station ownership by minorities was scarcely better. Although the first African-American broadcaster was licensed in 1949, [FN38] by 1971 only ten of approximately 7,500 radio broadcast licenses were owned by minorities. [FN39] The court in Citizens Communications Center v. FCC noted that new interest groups and minorities must be given broadcast opportunities and indicated that few stations were minority-owned. [FN40]

C. Development of Minority Preference Policies

1. Qualitative enhancements in comparative hearings In TV 9 [FN41] the D.C. Circuit held that the FCC had erred by not giving proper consideration to an applicant's minority ownership and participation. [FN42] The court reasoned that promoting minority ownership was consistent with the FCC's primary objective of ensuring maximum diversification of ownership of mass communications media, and therefore concluded that the reasonable expectation of diversity, and not advance demonstration, was adequate for a preference to be awarded. [FN43] After TV9, the FCC began awarding a qualitative enhancement for minority ownership. [FN44]

Qualitative minority ownership enhancements are awarded during the comparative hearing process [FN45] for a broadcast license only after it is determined that the applicant is not entitled to a preference under 47 U.S.C. 307(b) [FN46] or has a clear quantitative advantage. Two quantitative factors are considered: (1) the applicant's ownership interest in other broadcasting mass media [FN47] and (2) the applicant's integration of ownership and management. [FN48] If there is no clear quantitative advantage, the candidates are evaluated based on a series of qualitative factors such as: local residence, civic participation, past broadcast experience, and minority and female ownership. [FN49] Therefore, in order for minority ownership to be considered in the process at least two conditions must be met: (1) there is no s 307(b) preference and (2) there is no quantitative advantage.

2. Minority preferences for tax certificates and distress sales By 1978, it was apparent that neither the FCC's policies nor the marketplace were significantly increasing minority ownership. Less than 1% of all broadcast stations, or fewer than 85, were owned by minorities. [FN50] In April 1977, the FCC held a conference to analyze the reasons for the continued underrepresentation of minority broadcasting owners. [FN51] Participants complained that years of racial discrimination created barriers that prevented minorities from becoming broadcasters. Purchasing a broadcast license was difficult for minorities since they were outside of the "Old Boy Network"' and often did not receive information about potential station sales; [FN52] they also lacked capital, and could not easily obtain financing. [FN53] Challenging a license during a renewal was difficult because of the cost, length, and uncertainty of the process. [FN54]

A week after the conference issued its report, the FCC announced two new policies: minority preferences for tax certificates and in distress sales. In 1978, the FCC announced that tax certificates, which allow licensees to defer the capital gains tax on sales, would be awarded to transferors who sold their licenses to groups with minority ownership. [FN55] Because prices of broadcast facilities are escalating, a tax certificate is an extremely persuasive incentive since it can result in millions of dollars in deferred tax liability. The distress sale policy allowed a broadcaster whose license has been designated for a revocation hearing or whose renewal application has been designated for hearing on basic qualification issues to assign or transfer her license to a minority ownership group at a "distress sale"' price. [FN56]

Since the licensee, barring the minority preference, would not normally be able to sell, [FN57] the program was beneficial to the seller since she could receive capital, avoid an expensive revocation hearing, and eliminate the stigma of a revoked license. The purchaser received the advantage of purchasing the station at a discount. However, the impact of the distress sale policy was rendered moot by deregulation [FN58] and the Shurberg decision. [FN59]

II. Methodology

When preference programs are evaluated, a critical issue is whether the remedial policy addresses instances of specific racial discrimination. [FN60] Similarly, when the FCC's minority preference policies have been reviewed by the courts, questions about the presence of racial discrimination arise. [FN61] The primary source of evidence of racial discrimination in the broadcasting industry to date has been through legislative histories and congressional hearings. [FN62]

A. Sample Group

To help clarify whether there is racial discrimination in the broadcasting industry, I surveyed twenty African-American broadcasters who collectively own 54 radio stations, or approximately 30% of those owned by African-Americans in the United States. [FN63] These station owners were selected randomly but with the objective of obtaining responses from different geographic areas and from owners with different levels of experience. While the stations were located in a variety of geographic areas ranging from a small predominantely African- American southern town (Tuskegee, Alabama) to New York City, the greatest concentration of the stations was in the South. [FN64] Twenty-five percent of the broadcasters were women. [FN65] Although there is no scientific basis to conclude that the sample group is typical of the average African- American broadcaster, it is representative of a broad cross-section, and reveals many characteristics that contradict the negative media images of African-American entrepreneurs who seek to enter the broadcasting industry. [FN66]

1. Prior broadcasting experience Contrary to the image of an inexperienced applicant, 50% of the sample group had prior broadcasting experience before they purchased their first station. Twenty-five percent had more than fifteen years of experience when they purchased their first station. [FN67] Five owners had been general managers of stations before acquiring their broadcast facility. [FN68]

Fifty percent of those acquiring broadcasting experience worked either for a Black-formatted or African-American-owned station. [FN69] Given figures indicating that African-Americans only occupy between 3%-6% of the upper job classifications in the broadcasting industry, [FN70] it appears that mainstream broadcasting facilities may not be creating adequate opportunities for minorities to acquire experience. [FN71] One broadcaster, who gained her initial experience in mainstream facilities indicated that she later took a job offer in Nigeria because she was unable to gain comparable managerial experience in the United States. [FN72] Another credited earlier FCC policies with influencing broadcasters to create employment opportunities for minorities that indirectly helped him to get a job with a television station. [FN73] However, another broadcaster, who tried to get a job as a newscaster, prior to the implementation of the FCC's EEO policies, was denied the opportunity to be interviewed when he showed up for an appointment, although he had studied at New York University's School of Radio and Television. [FN74]

The women broadcasters who were interviewed also had broadcasting experience prior to the time they acquired their first stations. Cathy Hughes had seven years experience and had been the general manager of two radio stations before she purchased her first station. [FN75] Mutter Evans had worked in news, sales, public affairs, and finally as a general manager, before purchasing the station of her former employer. [FN76] Barbara Lamont had approximately 31 years of various experience in broadcasting, including reporting as well as managing, before she purchased a television station. [FN77] Another broadcaster decided to pursue acquiring her own station after a group interested in obtaining a license asked her to participate; but then called the deal off when she demanded that she actually be given some responsibility once the station was acquired. [FN78]

2. Multiple ownership Most of the broadcasters owned more than one station, with the average being 2.9. [FN79] Based on data from the National Association of Broadcasters and NABOB this characteristic may be atypical. Those surveys indicate that the average African-American broadcaster owned a single station. [FN80]

3. AM-FM ownership Twenty-eight of the stations owned were AM and 26 were FM. This represents a higher ownership of FM stations proportionately than the general population of African-American broadcasters. For example, in the latest listing of NABOB members, 112 of the 184 stations owned were AMs; and the last NAB survey reported that 94 of the 150 African-American owned stations were AM. [FN81]

4. Length of time in business The average time the surveyed owner had been in broadcasting was approximately thirteen years. Seven had sold a station within the past three years. [FN82] Five had sold some stations to minorities. [FN83] Ten of the sixteen broadcasters who answered this question entered the broadcasting industry between 1971 and 1980. Only one of the broadcasters who was interviewed was in business before 1972. [FN84]

5. Ownership structure Most of the broadcasters used a corporate structure. Two indicated that they were 100% owners. [FN85] Of the eleven broadcasters who responded to questions about their specific percentage of ownership, six indicated that their businesses were 100% minority owned. [FN86] One indicated that his business was 95% minority owned. [FN87] Five broadcasters indicated that they owned between 51%-55% of their corporations. [FN88] Three owned between 9%-38%. [FN89] One broadcaster owned 67% of a limited partnership. [FN90]

B. Methodology

Broadcasters were asked to identify examples of discrimination that they experienced in acquiring and operating their stations. They also were asked to identify obstacles they felt characterized the experiences of minorities in the broadcasting industry. Other professionals knowledgeable about broadcasting, such as advertisers, brokers, rating service executives, representatives of trade organizations and representatives of the FCC were also consulted to help evaluate whether these obstacles were the result of racial discrimination. [FN91]

III. Obstacles to Minority Station Acquisition

A. Lack of Access to High Quality Stations

Licenses to many of the highest quality stations were issued during the formative years of the regulated broadcasting industry. Since African-Americans were subjected to severe societal and state-sanctioned racial discrimination, however, they were not able to take advantage of these opportunities. [FN92] In the South, where most African-Americans lived prior to World War II, laws which mandated social and economic segregation of the races were generally not overturned until the civil rights struggles of the 1960s and 1970s. [FN93] Since racial discrimination meant that African-Americans were often denied access to quality education, [FN94] relegated to unskilled or undesirable employment, and restricted from participating in the mainstream, [FN95] they often lacked capital as well as business experience at the time when broadcasting licenses were being awarded, particularly from 1934-1970. [FN96] However, even the few African-Americans who were in a position to apply for broadcasting licenses in these early years often were discouraged or denied the opportunity to do so. As Percy Sutton, Chairman of Inner City Broadcasting, Inc. recently testified:

. . . when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent. [FN97]

Similar obstacles were reported by the late Dr. Haley Bell, who purchased a radio station in Detroit in the early 1950s, and indicated that he had tried to buy a radio station for more than 25 years before his successful purchase. [FN98]

As a result of racial discrimination, when African-Americans began to enter the broadcasting industry as license applicants, there were few high quality stations available. While reliable statistics are not available, it has been reported that until 1949 there was not a single African-American owned radio station, and neither were there more than four or five owned in the 1950s. [FN99] One of the greatest spurts of ownership prior to the implementation of the FCC's policies seems to have occurred in 1972 when, according to research conducted by R.D. Bachman, ten stations were acquired by African-Americans, increasing their total ownership to twenty stations. [FN100] However, by mid- 1973, 85% of authorized AM stations -- those most accessible to African- Americans -- were allocated, as well as 68.5% of FM stations. [FN101] The policy of the FCC is to renew licenses where there is "meritorious service."' Because few minorities owned stations, the unintentional result of the FCC's policy which preferred incumbent owners was "inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees"'. [FN102]

The impact of the expanding FM station market and price inflation on African-Americans who entered the broadcasting industry in the 1970s had two general results. First, African-Americans tended to purchase AM stations, often of low power, as owners moved to the newly expanding, more expensive FM stations, which had the capability of broadcasting in stereo. A survey conducted in 1974 by the Radio Department of Howard University of twenty-nine African-American-owned radio stations found that 89% were daytime AM stations (i.e., stations whose licenses only allowed them to broadcast from sunrise to sunset) and 50% of the stations were of one kilowatt or less. [FN103] Therefore, ironically, at the same time FM radio was becoming an important force in the market, African-Americans were concentrating their purchases in the AM market. [FN104] Second, many of the stations were selling at inflated prices. In contrast, during the formative years of the broadcasting industry, many stations were obtained at comparatively modest costs. [FN105] Low-power stations were later sold to African-Americans for ten to fifteen times the cost of the original investment. [FN106]

Today, although there is more diversification in station ownership among African-Americans, the majority of African-American owned stations still are AM and often "small properties, outside large population centers and mainstream advertising demand."' [FN107] Changes in the market for broadcasting properties have caused more frequent combination sales (package deals involving several stations), and have thus increased the price of desirable properties. Therefore, many minorities can only afford to buy AM properties. [FN108] As Jim Hutchinson, a multiple station owner, described the change in the industry:

The whole ballgame has escalated. Properties are harder to get; financing is harder to get; deregulation; the anti-trafficking rule suspension; the number of stations one owner can own; the widespread use of syndications and limited partnerships to buy; the involvement of Wall Street in transactions. There has been a total change in the industry. [FN109]

Although there are a handful of African-American broadcasters who, because of their track record with multiple station ownership and their alliances with institutional investors, have access to a multitude of high quality stations, their experience may not be typical of other African-American broadcasters. [FN110] Some of the other broadcasters interviewed felt that another obstacle which continued to face many minority broadcasters was an inability to receive information about quality station sales since they remained outside of the "old boy network."' [FN111] Many stations, when resold, are sold through brokers. However, broadcasters complain that brokers do not inform the general public about broadcast opportunities, but favor prior clients. [FN112] While it is understandable that a seller may not want it to be known that her station is available for sale because of the potential negative impact on her station personnel, newly entering broadcasters or those without established contacts may not learn about deals until after they have occurred. [FN113] Lack of information and the shortage of available stations may cause broadcasters to accept deals that are not very favorable, just to have the opportunity to enter the business. Mutter Evans, after explaining the tremendous difficulty she had in financing her station, which caused her to accept costly financing, summed up the feeling of frustration by saying: "You've got to belong to the network in order to be able to buy something that has a fighting chance. My deal was less than desirable, but I couldn't have gotten in the door otherwise."' [FN114] An earlier analysis of minority ownership confirmed the difficulty about getting information regarding station sales:

Information about stations for sale is not widely circulated. The most fruitful source of such information is the group of firms and individuals that acts as station brokers. Between one-third and one-half of all stations sold are never listed with brokers, however. These stations are purchased as the result of contacts directly between buyers and sellers or through information passed on by communications lawyers, national representative firms, other station owners and similarly established members of the broadcasting community. In practical terms these stations are available only to active members of that community. [FN115]

B. Difficulty in Obtaining Financing

The greatest problem facing minority broadcasters, according to my survey, is "getting financing and the lack of capital. [FN116] Many of the problems described echo the complaints voiced at the FCC's 1977 minority ownership conference. [FN117]

A principal barrier to minority ownership is the availability of funding . . . Unfortunately, experience has shown that minorities face unusually difficult problems in acquiring financing to purchase a broadcast station. . . . Prospective minority licensees, in most instances, have limited experience in managing broadcast properties and are regarded by financial institutions as relatively high risk borrowers. Additionally, many lending institutions do not like to become involved . . . when the principal asset . . . is a temporary license. [FN118]

What has changed since the FCC's conference is the nature of the market and the amount of capital required to enter the broadcasting industry. Today, station purchases are often millions of dollars, and to get a competitive price, a buyer may need to be able to afford a package deal (i.e., the simultaneous purchase of more than one broadcasting facility). [FN119]

Although the requirement that a potential borrower have prior broadcasting experience or equity is not restricted to African-Americans, past racial discrimination makes it more difficult for them to meet these demands. Employment discrimination in the broadcasting industry means that there will not be a large pool of African-Americans with relevant experience, especially in management. [FN120] Also, because past discrimination inhibited the ability of African-Americans to accumulate capital either through high paying jobs or business ventures, they are less likely to have resources to provide equity. As William Shearer, a Los Angeles station owner explained:

Some of the stations in my market now cost $55 million; which means you have to have at least $5 million in equity. There aren't too many of us with that in our checkbooks. This means you have to form groups or syndications. We seem to have problems doing that. [FN121] Established owners, as well as entering broadcasters, find it difficult to meet the spiraling prices of radio stations. Willie Davis, a multiple owner, explained that he decided to sell his AM station in Houston, bought with the expectation of pairing it with a particular FM, because of rapidly escalating prices that caused the six million dollar FM property to go up to thirteen million dollars within a few years. [FN122]

African-Americans, due to societal discrimination, may be perceived as "high risk"' borrowers in spite of past experience. Jim Hutchinson, today a multiple station owner and at the time of his entry a bank vice-president, was unable to get financing for his first station except through an African- American owned bank. [FN123] Charles Sherrell, who had been for fifteen years the general manager of the station which he later acquired, was turned down by three banks. In the case of two banks, he felt the rejections were due to race since their demands were overly stringent. He was able to get financing from a venture capital company that had attended a NABOB conference. [FN124] Ragan Henry, a partner in a major Philadelphia law firm and now the largest African-American multiple station owner, had a friend intercede when the bank threatened to withdraw on the eve of the closing of his first broadcast deal. [FN125]

C. Biases by Rating Services and Advertisers

A ripple effect of the difficulties in obtaining financing and high quality stations is that African-American broadcast facilities are often highly leveraged and have a greater dependency on advertising revenues to pay debt service. [FN126] Advertisers can play a vital role in impacting the financial success or failure of a station. [FN127] Many of the interviewees felt that they were not able to generate their fair share of advertising revenue because of racial discrimination that impacted rating services, advertising agencies and advertisers.

1. Inaccurate ratings Ratings are of critical importance in attracting advertising. [FN128] Since advertisers want their dollars to reach a maximum number of people, they use ratings to estimate the percentage of households in a market listening to a station. [FN129] An advertising agency will generally limit its purchases to the top two or three rated stations in a market. Therefore, if a station is rated incorrectly, this error can have a serious impact on its revenues. There are two major ratings services, Arbitron and Birch. [FN130] Arbitron, is clearly the most widely used service. [FN131] Arbitron however, measures audience listenership primarily by having members of selected households within a market record the stations they listen to within a seven day period. [FN132]

For many years minority broadcasters have complained that Arbitron's methodology undercounts African-American listeners. [FN133] The Minority Ownership of Broadcasting Facilities Report concluded that rating services were not accurately estimating minority listenership of Black-formatted stations. Specifically, the Report found that the services, which based their samples on the census, were not adjusted to compensate for minority underrepresentation in the census. Also, because the sample frame was telephone-based, some minorities would be underrepresented since they had fewer telephones. [FN134] Interviewees have complained that the methodology is flawed because African-Americans may be less likely to complete diaries; are less likely to have listed telephones; are less likely to receive diaries; and are more likely to have of their listenership impact diluted because a metropolitan market is used to evaluate rather than the city itself(where African-Americans are likely to comprise a proportionately greater portion of the population). [FN135] Some interviewees have found great discrepancies between their Arbitron ratings and their Birch ratings. [FN136] In one instance, Arbitron ranked a station numbers eight through ten in appropriate categories, while Birch ranked the station number one in the same categories. If an advertising agency used the Arbitron rating, the station might lose sales. Other broadcasters reported similar discrepancies. [FN137]

2. Inability to obtain advertising revenues proportionate to their audience share Black-formatted radio stations generally do not generate advertising revenues which are commensurate with their audience share. [FN138] In a study conducted in 1988 of 809 radio stations which compared twelve formats and their ability to generate advertising revenues commensurate with their audience shares, Black-formatted stations were the second least favorable category. [FN139] What this means, for example, is that if a Black- formatted station and a country-formatted station have the same number of listeners according to a rating service, the Black-formatted station can be expected to generate fewer advertising dollars. [FN140] Several interviewees expressed frustration at the inability to generate advertising revenues commensurate with their ratings. As Glenn Mahone explained:

Radio revenue is based on the market you can deliver. Your revenue is based on the cost per point, which is 1% of the population. In Richmond, advertisers typically pay $30 per point, but when they get to the Black station, they pay $20-25 per point, regardless of the product. O.K. if you're advertising a Mercedes we may not proportionately have as many customers; but hamburgers? [FN141]

3. Reluctance to advertise on stations owned by African-Americans Interviewees reported two types of discriminatory attitudes of advertisers which affected their ability to generate advertising revenue. The first was a reluctance of national companies to advertise on Black-formatted stations even when the station was one of the top-rated stations in the market. [FN142] Broadcast owners attributed this lack of responsiveness to discriminatory attitudes by national companies, who assume that African-Americans do not consume their products. As William Shearer explained when he was chairman of NABOB:

Advertisers don't seem to think that it is necessary to direct their advertising toward the Black market. . . . At NABOB we have made a great effort . . . to try to make the point that Blacks have and spend money and that we buy toothpaste, soap, and mouthwash like everybody else. Yet, usually it's the same companies which advertise on Black radio . . . and that's because of a top executive who is personally committed. [FN143]

However, advertising professionals claimed that the failure of national companies to advertise on Black-formatted radio is not the result of intentional discrimination but rather is a market-driven business decision. From their perspective, since companies want to reach the largest possible market, they seek to advertise on general market stations first and use stations with special formats only as specific needs arise. [FN144] Whether a national company will include the African-American market specifically within its general marketing campaign may depend on whether there is an advocate within the company or advertising agency who will suggest that African-Americans be included. [FN145] Advertising professionals indicated that sales decisions are a question of "dollars and cents"' and since computer programs often are used to select where advertisements will be placed, frequently the race of the station owners is not known. [FN146]

Both advertisers and broadcasters agree, though, that a minuscule percentage of national advertising dollars is targeted toward Black-formatted radio. As Waynett A. Sobers, Jr., then Executive Vice-President of Earl G. Graves, Ltd. testified:

The Black consumer market is valued at over $200 billion annually . . . the total national expenditure for advertising in 1984 was approximately $88 billion [of which] $6 billion [was] for radio [advertising] . . . [however,] an estimated $52 million [was spent] in advertising revenue for Black-owned radio stations or less than 1% of total U.S. radio advertising revenues. [FN147]

Today the situation has not changed much and an extremely small portion of national advertising dollars is devoted to the African-American market. Caroline Jones, who heads one of the leading African-American owned advertising agencies, explained:

It's not unusual for a company that is spending millions of dollars nationally to come to us with $250,000 and say: 'Here, give us a national Black-targeted advertising campaign which will track sales in six days.' It puts us under tremendous pressure since we are limited by our budget to place ads only in selected markets. [FN148]

African-Americans broadcasters argue that the placement of advertisements is not always a "color blind"' process. Local companies, they contend, do know the race of the owner, and may refuse to advertise on the station, even when a large part of their clientele is African-American. An owner of radio stations in a predominately African-American southern city complained that during his fifteen years of operation, the local supermarket chain had spent no more than $1,000 in advertising with his stations, despite numerous attempts to solicit ads, although the vast majority of the market's customers are African-American. [FN149] Mutter Evans, who bought the Black-formatted radio station where she used to work, reported that some clients cancelled their advertising as soon as her ownership was announced. [FN150] One of the most telling incidents was described by Cathy Hughes, who owns a radio station in Washington, D.C., which has a large African-American population:

There is a major drug store chain here in town which has never given us any business. When my son called, he was given an appointment to make a marketing presentation. However, when he arrived, he was forced to give the presentation in the lobby. [FN151]

One African-American broadcaster, who asked not to be identified, indicated that after he purchased a top-rated radio station in a major metropolitan market, some advertisers discontinued their accounts when it became known that he was the new owner of the station. However, multiple owners of highly rated stations that are not Black-formatted, reported they were unaware of any discrimination by local advertisers. [FN152]

IV. Is There a Nexus Between Minority Ownership and Programming Diversity?

When people evaluate the nexus between minority ownership and programming diversity they frequently assume that diverse programming is synonymous with Black or urban formatting. [FN153] While certainly the format of a station is a factor when evaluating its programming diversity, strictly equating diversity with Black-formatting is too narrow. This Current Topic argues that since the objective of the diversification doctrine is to ensure representation of diverse viewpoints, [FN154] other factors besides format must also be considered. These factors include: the commitment of the station to provide public service announcements or information pertinent to minority viewpoints; the hiring of minorities, who are assumed to be more sensitive to African-American needs; and the presenting of minority viewpoints. [FN155] This Current

Topic therefore considers these other factors when analyzing programming diversity.

A. Black-formatting

Fifty percent of the stations in the survey were characterized by their owners as being Black or urban-formatted. [FN156] This compares unfavorably with a finding of a recent report of the Congressional Research Service that analyzed data from approximately 79% of all broadcasting stations in 1988, and found that 65% of all radio stations with at least one African-American owner targeted their programming to African-American audiences. [FN157] The last survey of minority owners conducted by NAB found that 45% of African-American stations were Black or urban-formatted. [FN158]

However, both my survey and the NAB analysis indicate that it is a fallacy to strictly equate Black or urban formatting with programming targeted to African- American audiences. For example, although some of the broadcasters were clearly targeting their programming toward African-American audiences or expected to draw a high percentage of African-American listeners, they chose not to categorize themselves as Black or urban-formatted. One owner, whose station's call letters were derived from the initials of African-American leaders, described his station as "mass market with a Black base."' [FN159] Another broadcaster, whose two stations were established to fill a void for African- American listeners in the general Kansas City market, described her facilities as "general market with Black news."' [FN160] Some African-American broadcasters may not want to characterize their stations as Black or urban-formatted because they feel station formats make it more difficult to attract advertising revenue than general market or "disco"' stations, which nonetheless may be targeted towards African-American audiences. [FN161] This avoidance of a Black-format label is understandable since analyses indicate that urban, news, or general market stations are much more likely to earn proportionately greater advertising revenues when compared to audiences shares. [FN162] When my survey results are adjusted to include other categories that might be expected to be targeted toward African-American audiences (such as gospel and jazz), 61% of the stations were African-American targeted. [FN163] Similarly when the NAB analysis is adjusted to include other African-American targeted categories (i.e. black contemporary, rhythm and blues, black/Jazz, etc.), the percentage increases to 68%. [FN164]

Another important question that needs to be answered in order to evaluate the impact of minority ownership is whether it results in any qualitative content differences in Black-formatting. Historically, Black- formatted radio was controlled by white owners. The first Black-formatted radio Station, WDIA in Memphis, Tennessee in 1947, was an instant financial success and by 1977, there were approximately 108 Black-formatted stations. [FN165] However, these stations were often criticized for their lack of news coverage and their failure to serve "the needs of the black community."' [FN166] A study conducted by James Philip Jeter found that while African-American-owned stations diversified their music selections more than White-owned Black- formatted stations, there was not a significant difference quantitatively in the amount of time devoted to news and public service announcements. [FN167] Jeter, however, cautioned that a truly representative analysis must include a qualitative component, since comparing minutes devoted to categories of programming may not reveal differences in the programming. [FN168] A later study by Marilyn Diane Fife, an assistant professor at Temple University, confirmed the importance of qualitative analysis. [FN169] Although Dr. Fife's comparison of the news coverage of a White-owned and African-American-owned television station (WGPR) in the same market did not reveal significant differences in the time allocated to various news topics, except that the African-American owned station did not devote as much coverage to crime, there was a significant difference in the content of the topics covered. WGPR used a greater number of African-Americans in newsmaker roles and there was a higher coverage of issues with racial significance. [FN170]

B. Policies Encouraging Diverse Viewpoints

My survey revealed that many of the broadcasters tried to benefit the African-American community by including public service information pertinent to minority groups. Other spinoff benefits that minority ownership encourages are the employing and promoting of minorities, and the use of minority vendors.

1. Employment Of the seventeen broadcasters who responded to the question about the racial composition of their workforce, thirteen had staffs with greater than 70% minorities. [FN171] Seven had staffs which were 80% or more African-American. [FN172] The tendency of African-American owned stations to employ more minorities than White-owned, Black-formatted stations has been confirmed by other studies. For example, a study conducted by Paul Milton Gold of African-American-owned and White-owned Black-formatted stations found that 82% of the Black-owned stations had African-American general managers as compared to 27% of the White-owned stations. [FN173] Nearly 74% of the Black- owned stations had more than 75% African-American employees compared to fewer than 38% of the White-owned, Black-formatted stations. [FN174]

Some of the broadcasters indicated that they tried to ensure that their African-American employees were given maximum opportunity. One broadcaster indicated that he helped a highly qualified African-American woman, who had been in a dead-end position under the previous ownership, to become a station manager. The same broadcaster stated that he was helping one long-time African- American employee, who had not been promoted for several years prior to the interviewee's ownership, acquire a radio station. [FN175] Another broadcaster deliberately attempted to integrate the administrative staff of his station. Previously, African-Americans had been employed only as disc jockeys. [FN176] Even an owner whose station is in a community with less than 1% minority population actively recruited other minorities, who today comprise 8% of her staff. [FN177]

2. Public service Many of the owners surveyed have a sense of commitment to the African-American community that may influence their programming decisions, even though the primary factor in such decisions are market demands. For broadcasters with Black-formatted stations purchased from non-minority owners, this has resulted in a greater willingness to make the station accessible to community organizations, to increase community service announcements, or to provide other services over-the-air. While fulfilling a need, these activities did not generate revenue and prior owners either did not recognize them as important or were unwilling to do them. For example, a broadcaster who owns a Black-formatted station in a southern city began broadcasting obituaries as a public service because she recognized that many African-American families could not afford the fee charged by local newspapers. [FN178] The enhanced commitment of African-American broadcasters to serving the African-American community, even in predominantly White markets, was also reflected in attempts to include information regarding the viewpoints or concerns of minorities, even though the majority of the programming was not minority-targeted. A broadcaster in Hart, Michigan, which has a minority population of less than 1%, provided in-depth coverage of Martin Luther King, Jr. on his birthday and tried to include other pertinent information whenever possible. [FN179]

V. Are Minority Preference Policies Effective?

A. General Impact

All of the broadcasters felt that the FCC's policies to encourage minority broadcasting were successful in improving opportunities to purchase stations. Eleven of the 20 broadcasters interviewed had used the FCC's minority ownership policies in the acquisition of their stations. Eight were involved in transactions with tax certificates, five had acquired stations through distress sales, and one had acquired a station where a minority preference in a comparative hearing was instrumental. [FN180] Many of the station owners attributed the ability to use one of the preference policies with their ability to purchase a station. Many associated the preference policies with the willingness of the seller to consider a minority purchaser, or with opening the door to an opportunity.

Jim Hutchinson is believed to be the first minority to use the preference policy in a distress sale. Hutchinson was trying to purchase WLTA-AM in Gary, Indiana whose license was being challenged because of its policies of broadcasting material which was racially offensive. After the city of Gary indicated that the shutting down of the station would be a great disservice to the city, the FCC agreed to let the station sell the property to a minority within 30 days. [FN181] Similar stories have been reported by other owners, regardless of the markets they operate in and the number of stations which they own. Willie Davis believed that the tax certificate significantly enhanced his ability to acquire at least three stations. [FN182] Bennie Turner credited the distress sale with being responsible for his ability to acquire two stations in Columbia, Mississippi where otherwise he would not have been able to get the cooperation of the prior owners. [FN183] Nancy Waters, whose purchase was adjudicated in West Michigan, attributed her ability to acquire a station in Hart, Michigan to the preference policy in the comparative hearing process. [FN184]

In short, the policies have been effective in helping minorities to gain access to the informal network of influential members of the broadcasting industry, which allows them to learn more easily about and participate in sales. Because sellers now are anxious to gain the advantages of the tax certificate, brokers have increased their contacts with potential minority purchasers. [FN185]

The greatest impact of the policies has been the growth in ownership among African-American broadcasters. As the executive director of NABOB said, "Before 1978, there were approximately 80 radio stations and one TV station. Now there are some 184 radio stations and 15 television stations. This growth is directly attributable to the FCC's policies."' [FN186]

B. Sham Transactions

A by-product of the minority preference policies has been the development of sham transactions. Sham transactions are those where a minority, who has no intention of operating or retaining a business enterprise, allows herself to be presented as the titular head of an organization (i.e., in control of the voting stock) in order that her White partners can receive the benefit of the minority preference policy. In these transactions the minority typically makes no substantive equity contribution and intends to sell her interest once the license is awarded. Because there is never any sustained minority ownership, these policies are a sham.

The press has sometimes publicized these transactions as justifications for ending the preference policies; however, this would throw out the baby with the bath water. New regulations are needed to curb these abuses. However, suggestions for regulations to halt shams, while not impeding sincere minorities' entry into the broadcasting industry, probably are best developed after greater dialogue between minority broadcasters and the FCC. One suggestion might be to institute policies requiring an owner who obtains a station through a minority preference to retain ownership for a certain amount of time. Another might be to require a certain minimum amount or percentage of equity to be contributed by minority owners who use preferences. However, policy-makers must take care that such policies do not arbitrarily establish equity thresholds, which will impede sincere minorities who wish to participate in large-scale broadcasting transactions.

VI. Conclusion

This Current Topic has analyzed African-American ownership in the radio broadcasting industry in order to clarify the necessity of the FCC's minority preference policies. This study has shown that years of racial discrimination directed against African-Americans prevented them from being able to acquire high quality stations in the early years of the regulated broadcasting industry when the majority of frequencies were allocated. The FCC's policy of preferring to renew licenses, as well lender financing policies that require certain levels of capital and broadcasting experience, have contributed to the gross underrepresentation of minorities in the broadcasting industry.

Minority preference policies are necessary to address past discrimination and ensure that minority viewpoints are represented on the public airwaves. Race neutral policies--such as ascertainment or encouraging minority employment--and marketplace strategies have both failed to solve these problems.

The more than doubling of minority licenses since minority ownership policies were initiated can largely be attributed to the existence of these preference programs. While this Current Topic has focused primarily on the broadcasting industry, similar studies regarding other industries are also likely to show that minority underrepresentation is due to racial discrimination rather than to the failure of minority groups to be attracted to a particular industry. As one broadcaster said,

Years ago it was stated that minorities could not be successful operators of franchises. However, once the door was opened, this prediction was proved wrong. A similar situation exists in broadcasting. Once the FCC's minority preference policies created the opportunity, we were eager to enter the industry. [FN187]

FN1. See e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (whenever a policy uses racial classifications, regardless of its benign intent, strict scrutiny is required); Fullilove v. Klutznick, 448 U.S. 448 (1980) (where the Court upheld a set-aside policy created by Congress which was of limited duration, flexible, and did not impose an undue burden on innocent third parties); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (where the Court held that a program which gave priority to minority teachers during lay-offs was unconstitutional because it did not remedy specific discrimination) and City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989) (where the Court held that a city policy requiring a 30 percent set- aside for minority subcontractors was unconstitutional since it was not narrowly tailored to address any discriminatory violation).

FN2. Telephone interview with James L. Winston, Executive Director and General Counsel of the National Association of Black Owned Broadcasters, Inc. [hereinafter NABOB] (April 24,

1989) (indicating that many of his members have been able to acquire broadcasting properties as a result of the Federal Communications Commission's [hereinafter FCC] minority preference programs).

FN3. For example, in the broadcasting industry, when minorities, with little or no equity investment and with no intention of staying in broadcasting, purport to control an interracial group which acquires a broadcasting station using a minority preference, the transaction is commonly called a sham. See infra p. 410.

FN4. Rudnitsky, How the Rich Get Richer, FORBES, May 15, 1989, at 38 (claiming that tax certificates, one of the FCC's minority preference programs, have done little more than enrich already rich corporations or wealthy minorities at the expense of taxpayers).

FN5. When widespread urban rioting occurred throughout the United States during 1967, President Johnson appointed the National Advisory Commission on Civil Disorders (the "Kerner Commission"') to analyze the reasons for the the disturbances and to make recommendations to prevent their reoccurrence. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 3 (1968) [hereinafter KERNER REPORT].

FN6. For example, in 1968, the SBA created a set-aside program which reserved a portion of federal contracts for minority-owner firms. See Garcia, Experts Debating How to Help Minority Business, San Francisco Chron., Feb. 6, 1990, at A1.
FN7. KERNER REPORT, supra note 5, at 10. The Commission recommended that there be expanded coverage of the African-American community through "better links"' and the increased integration of African-Americans in all aspects of the industry.

FN8. While certainly the KERNER REPORT was a major catalyst in the development of the FCC's policies, another factor was the increased activism of civil rights groups which brought suits and initiated other legal actions demanding that broadcasters be more representative of minorities. See Honig, The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 HOW. L.J. 854, 864 (1984) (indicating that litigation and protest by citizen advocacy groups influenced the development of the FCC's EEO policies which caused an increase in minority employment in the broadcasting industry).

By "race neutral"' I mean policies that do not allocate preferences based on racial classifications.

FN9. In both 1977 and 1979, the United States Commission on Civil Rights released studies which documented the serious underrepresentation and stereotyping of women and minorities on prime time television. See UNITED STATES COMMISSION ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION (1977) [hereinafter WINDOW DRESSING] and WINDOW DRESSING ON THE SET: AN UPDATE (1979) [hereinafter WINDOW DRESSING II]. For explanations of the EEO and ascertainment policies, see infra notes 30-33 and accompanying text.

FN10. TV 9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), established the precedent for awarding a qualitative enhancement for minority ownership on the grounds that such ownership was likely to lead to greater programming diversity. The awarding of a qualitative enhancement for minority ownership is not determinative of the award of a license. Qualitative enhancements are considered only if no applicant has a clear quantitative advantage or prevails under Section 307(b) of the Communications Act. See Winter Park Communications v. FCC, 873 F.2d 347, 353-54, (D.C. Cir. 1989), cert. granted sub nom. Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 715-54 (1990). For a fuller discussion of the minority qualitative enhancement, see infra p. 387.

FN11. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 982-83 (1978) [hereinafter Minority Ownership Policy Statement].

FN12. Id. at 983. The FCC discontinued the minority preference in distress sales following Shurberg Broadcasting of Hartford Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). See Minority Broadcast Ownership: Hearings Before the Subcomm. on Communications, Senate Comm. on Commerce, Science, and Transportation (1989) (Statement of Roderick K. Porter, Deputy Chief, Mass Media Bureau, FCC) [hereinafter Porter testimony].

FN13. On June 27, 1990 the Supreme Court held that these policies are constitutional. Ruling 5-4 in Metro Broadcasting v. FCC, ____ S.Ct. ____, (1990 WL 85319), the Court said that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible."' Prior to that, courts sent mixed signals on the issue. See, e.g., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985) (affirming minority enhancement as a rational means of encouraging minority ownership which would result in more diverse viewpoints); Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985) (the FCC's preference for female ownership was held unconstitutional since it bore no rational relationship to the accomplishment of program diversity); Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989), cert. granted sub nom., Astroline Communications Co. v. Shurberg Broadcasting of Hartford Inc., 110 S.Ct. 715 (1990) (FCC's minority preference in distress sales held to be unconstitutional since it was not narrowly tailored enough to meet the objective of either remedying past discrimination or promoting program diversity); Winter Park Communications Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989) cert. granted sub nom. Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 715 (1990) (court upheld the minority preference in comparative hearings since it was "but one factor in a competitive multifactor selection system that is designed to obtain a diverse mix of broadcasters").

FN14. See Shurberg, 876 F.2d at 914.

FN15. Id. at 926.

FN16. Id.

FN17. Brief for Petitioner at 4, 13, Metro Broadcasting, Inc. v. FCC, cert. granted, 110 S.Ct. 715 (1990) (No. 89-453).

FN18. Id. at 16.

FN19. Deregulation and shifting the government's role in guaranteeing civil rights from an active advocate to an observer has negatively impacted minorities. For example, deregulation of the radio industry, which lessened most of the FCC's ascertainment and news requirements, is perceived as indirectly causing minorities to lose jobs. Telephone interview with James L. Winston, supra note 2. There have also been numerous complaints that EEO regulations have not been stringently enforced. See Presentation of Anthony L. Pharr, Office of Communication, United Church of Christ, FCC EEO Conference (Jan. 23, 1989).

FN20. See, e.g., Croson, 109 S.Ct. at 727 (indicating that none of the evidence presented points to identified discrimination in the Richmond construction industry), and Shurburg, 876 F.2d at 915 (indicating that there is not adequate evidence to demonstrate that minority underrepresentation is the result of past discrimination rather than the fact that minorities may be "disproportionately attracted to industries other than broadcasting.")

FN21. See, e.g., Comment, The Female Merit Policy in Steele v. FCC: "A Whim Leading to a Better World?'', 37 AM. U.L. REV. 379 (1988) (arguing that the FCC female merit policy is constitutionally permissible); Comment, The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcasting Licenses, 83 NW. U.L. REV. 665 (1989) (arguing that the FCC's merit policy for minority ownership in comparative hearings is constitutional); Comment, Constitutionality of Affirmative Action Regulations Imposed Under the Cable Communications Policy Act of 1984, 35 CATH. U.L. REV. 807 (1986); but see Honig, The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 HOW. L.J. 854, 860 (1984) (indicating that the FCC's minority ownership policies have had little impact because they operate "in the context of the severe financial impediments and shortages of desirable new frequencies facing minority entrepreneurs").

FN22. Although these minority preference policies also apply to television broadcasters, this Current Topic focuses on radio broadcasters, who make up the vast majority of African-American owners. As late as 1971, there was not a single African-American owned television station. Brief for the Federal Communications Commission at 7, n.4, Metro Broadcasting, Inc. v. FCC, cert. granted, 110 S.Ct. 715 (1990) (No. 89-453) [hereinafter FCC Brief]. In 1986, African-Americans owned 21 television stations out of a total of 1,262. NATIONAL ASSOCIATION OF BROADCASTERS, MINORITY BROADCASTING FACTS 6, 9 (1986) [hereinafter NAB FACTS].

Interviewees were selected from lists of minority broadcasters that were provided by the National Association of Broadcasters and NABOB. An attempt was made to survey a representative cross-section of African-American radio broadcasters by looking at such factors as geographic location, distribution of AM and FM frequencies and the extent of multiple station ownership. See infra Appendix A for the list of interviewees.

FN23. See TV 9 Inc. v. FCC, 495 F.2d 929, 937 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

FN24. 47 U.S.C. s 303 (1).

FN25. See Associated Press v. United States, 326 U.S. 1 (1945).

FN26. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

FN27. 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 717 (1990).

FN28. See Shurburg, 876 F.2d at 921.

FN29. FCC Brief, supra note 22, at 31 n.25.

FN30. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C.2d 766, 772 (1968).

FN31. See Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 244 (1969) [hereinafter EEO I].

FN32. See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

FN33. In 1981, many of the FCC's ascertainment requirements were reached as part of its deregulation of the broadcasting industry. See In the Matter of Deregulation of Radio, 84 F.C.C.2d 968, 973 (1981) [hereinafter Deregulation Statement].

FN34. Other race-neutral policies also were adopted later by the FCC to encourage minority ownership. For example, previously the FCC required that a license applicant have sufficient funds to construct and operate a station for one year. After the Minority Ownership Task Force, which was convened by the FCC in 1977, indicated that this requirement was a barrier to minority ownership, the obligation was reduced to three months. See FCC Brief, supra note 22, at 45, n.46.

In 1979 the FCC disseminated a listing of minorities who were interested in purchasing broadcasting facilities. Id. at 45, n.47. Finally, the FCC expanded the total number of radio and television stations, thereby increasing opportunities for minorities to enter the broadcast industry. Id. at 45, n.48.

FN35. This Current Topic argues that although the primary rationale for these policies has been encouraging diverse viewpoints over the public airwaves, a secondary rationale has been to remedy past discrimination. This interpretation reflects the viewpoint in a recent statement by the FCC itself: See FCC Brief supra note 22, at 32-33 (indicating that minority preference policies in broadcasting are justifiably attributable to remedying past societal discrimination).

FN36. See WINDOW DRESSING AND WINDOW DRESSING II supra note 9.

FN37. WINDOW DRESSING II, supra note 9, at 87.

FN38. Amicus Curiae Brief of the National Association of Black Owned Broadcasters, Inc. in support of Petitioner at 17 n.2, Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., cert. granted, 110 S.Ct. 715 (1990) (No. 89-700).

FN39. Citizens Communications Center v. FCC, 447 F.2d 1201, 1213, n.36.

FN40. Id.

FN41. TV 9, 495 F.2d at 936-37.

FN42. Id. at 937.

FN43. Id. at 937-38. The court reasoned that since there was no requirement for an advance demonstration of the nexus of program diversity to be awarded for a local residence merit, neither should such proof be required for a minority ownership preference.

FN44. Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) reaffirmed TV 9 and emphasized that no advance demonstration of a nexus between minority ownership and programming diversity was required.

FN45. The comparative hearing process seeks to achieve the dual objectives of ensuring the best practicable service to the public and a maximum diversification of control. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) [hereinafter 1965 Policy Statement].

FN46. An applicant who is entitled to a preference under 47 U.S.C. s 307(b) based on her ability to provide first or second local service will prevail without a comparative hearing. Section 307(b) of the Communications Act, Pub. L. No.97-259, 96 Stat. 1093 (1982) (codified at 47 U.S.C., s 307(b)) requires the Commission "to provide a fair, efficient, and equitable distribution"' of broadcast service among states and communities. See Winter Park, 873 F.2d at 349.

FN47. Credit is given to the applicant with no other mass media ownership interest. See Brief for Respondent Intervenor Rainbow Broadcasting Company at 2, Metro Broadcasting, Inc. v. FCC, cert. granted, 110 S.Ct. 715 (1990) (No. 89-453).

FN48. Credit is given based on the percentage of ownership that will work full- time at the station, with the amount of credit given influenced by the policy- making and management level of the jobs. Id. at 2-3.

FN49. FCC Brief, supra note 22, at 3.

FN50. Minority Ownership Policy Statement, supra note 11, at 1.

FN51. The conference was held on April 25-26. 1977, FEDERAL COMMUNICATIONS COMMISSION, MINORITY OWNERSHIP TASK FORCE, REPORT ON MINORITY OWNERSHIP IN BROADCASTING (1978) [hereinafter MINORITY BROADCASTING OWNERSHIP REPORT].

FN52. Id. at 9. One problem was that most stations were sold by brokers unaccustomed to dealing with minority clients, who were outside of the "old boy network"'.

FN53. Id. at 14. Commercial banks were reluctant to finance broadcasting facilities which were risky, particularly since the license, often the most valuable aspect of the property, was subject to renewal. Because minorities generally had no prior experience in the broadcasting business, banks were all the more reluctant to lend.

FN54. Id. at 10. Recently the FCC estimated that completion of the hearing process can take as long as 3-5 years. See The Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery) 4 F.C.C. Rec'd 2256, 2257 (March 10, 1989) [hereinafter Lottery Statement]. One of the interviewees indicated that she had spent over $500,000 in legal fees while engaged in comparative hearings. Telephone interview with Barbara Lamont, see infra Appendix A. Participants also complained about the lack of available high quality unused frequencies and discrimination by advertisers and rating services which impacted the ability of Black-formatted stations to generate revenue. MINORITY BROADCASTING OWNERSHIP REPORT, supra note 51, at 10, 23-27.

FN55. Based on Section 1071 of Internal Revenue Code, the FCC has the authority to issue certificates which allow licensees to defer the capital gains tax on sales when necessary to adopt a new policy or effectuate a policy change. Minority Ownership Policy Statement, supra note 11, at 983. Although originally the group had to have at least 50% minority ownership, after 1982, only 20% minority-ownership was required. Id. at n.20. See In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982).

FN56. Minority Ownership Policy Statement, supra note 11, at 983.

FN57. Id. Prior to the implementation of the minority preference policies, generally a broadcaster whose license was subject to revocation was not permitted to sell, except under extraordinary circumstances such as in the event of bankruptcy or when the seller was physically or mentally disabled.

FN58. Since the substantial deregulation of the broadcasting industry began in 1981, there has been a significant decline in distress sales. Between 1978 and 1982, there were twenty-six distress sales. However, since 1982, there have been only ten. CONSUMER ASSISTANCE AND SMALL BUSINESS DIVISION, OFFICE OF PUBLIC AFFAIRS, FEDERAL COMMUNICATIONS COMMISSION, MINORITY OWNERSHIP LISTS (1988). [hereinafter MINORITY OWNERSHIP LISTS]. There have been no minority preferences in distress sales since Shurberg; see Porter Testimony, supra note 12, at summary.

FN59. See Shurberg, supra note 13.

FN60. See, e.g., Fullilove, 448 U.S. at 478 (indicating that while Congress did not include preambulatory findings in its legislation to provide that grantees of the Local Public Works Capital Development and Investment Act of 1976 must set aside 10% of funds for minority enterprises, Congress had historical basis to conclude that remedial action was warranted); Wygant, 476 U.S. at 274 (indicating that societal discrimination alone is not sufficient to justify a racial classification); and Croson, 109 S.Ct. at 714 (stating that the city had failed to show any probative evidence of discrimination in the local construction industry).

FN61. See, e.g., Shurberg, 876 F.2d at 913-914 (indicating that the FCC seems to justify the distress sale minority preference both as a means to diversify programming and to remedy past discrimination, but faulting both Congress and the FCC for failing to provide any evidence to link minority underrepresentation with specific discriminatory practices in the broadcasting industry); and Winter Park, 873 F.2d at 353 (affirming the District Court of Western Michigan's finding that Congress had determined that minority underrepresentation was the result of prior racial and ethnic discrimination).

FN62. See, e.g., Winter Park, 873 F.2d at 353 (citing H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982)) as providing the evidence for Congress' assertion that there is minority underrepresentation in the broadcasting industry) and Brief for Respondent Intervenor Rainbow Broadcasting Company, supra note 47, at 14 (indicating that for nearly a decade Congress has held numerous hearings regarding the lack of minority broadcasters).

FN63. See Appendix A for the list of broadcasters surveyed. It is difficult to determine the exact number of African-American-owned stations. The last comprehensive study conducted by the National Association of Broadcasters in 1986 indicated that there were 150. See NAB FACTS, supra note 22, at 8. The latest membership list of NABOB indicated that there were 184 African-American owned stations. NABOB, membership list (Apr. 6, 1990) (unpublished).

FN64. See infra Appendix A (eighteen of the 54 radio stations surveyed were in the South).

FN65. Id. (telephone interviews).

FN66. See Kinsley, Invidious Distinction, NEW REPUBLIC, Feb. 5, 1990, at 4 (indicating that the people taking advantage of the minority preference rules are "those who are already well-to-do, and those who are simply fronting for white businessmen").

FN67. These broadcasters reported a variety of experiences. Howard Sanders, who had approximately twenty-five years of experience in the broadcasting industry, had worked as a reporter, hosted a television show, owned and operated an advertising agency and managed WYCB-AM in Washington, D.C. that he now owns. Telephone interview with Howard Sanders, see infra Appendix A. Paul Major had worked for seventeen years both in television and radio before acquiring WTMP- AM in Tampa, Florida. Telephone interview with Paul Major, see infra Appendix A. Charles Sherrell had fifteen years of broadcasting experience and was the general manager of WBEE-AM in Chicago when he purchased it. Telephone interview with Charles Sherrell, see infra Appendix A. William Shearer had twenty years of broadcasting experience and Skip Finley nineteen years, when they bought their first stations. Telephone interviews with William Shearer and Skip Finley, see infra Appendix A.

FN68. These were Cathy Hughes, Howard Sanders, William Shearer, Charles Sherrell, and Mutter Evans. Telephone interviews, see infra Appendix A.

FN69. William Shearer, Cathy Hughes, Charles Sherrell, Mutter Evans, and Glenn Mahone had experience with Black-formatted or African-American-owned stations before acquiring their stations. Telephone interviews, see infra Appendix A.

FN70. See infra note 120.

FN71. See Presentation of A. Pharr, supra note 19 at 3. Other reports also have indicated that employment opportunities for minorities are either stagnating or declining. See, Payne, In TV News, a Trend Back to Lily-White, Newsday, Sept. 18, 1988 at 9 (quoting a study by Vernon Stone, Director of Research Services for the Radio-Television News Directors Association which indicated that minority representation in broadcast news was about the same in 1987 as in 1972 and that African-Americans held only about .3 percent of news directors jobs).

FN72. Profile: Barbara Lamont-Making Impossible Dreams Come True, AFRICA MONTHLY, Mar.-Apr. 1990, at 10.

FN73. Telephone interview with Skip Finley, see infra Appendix A.

FN74. Telephone interview with Andrew Langston, see infra Appendix A.

FN75. Telephone interview with Cathy Hughes, see infra Appendix A.

FN76. Telephone interview with Mutter Evans, see infra Appendix A.

FN77. Telephone interview with Barbara Lamont, see infra Appendix A.

FN78. Telephone interview with Nancy Waters, see infra Appendix A.

FN79. These figures include the four then being negotiated for by Ragan Henry. Telephone interview, see infra Appendix A.

FN80. NABOB membership list, supra note 63 and NAB FACTS, supra note 22 at 8, 15-35.

FN81. See NABOB membership list, supra note 63 passim and NAB FACTS, supra note 22 at 8, 15-35.

FN82. The following broadcasters indicated that they had sold stations during the past three years: Pierre Sutton (3), Howard Sanders (2), Ragan Henry (10- 11), Ronald Davenport (1), Robert Lee (7), Jim Hutchinson (2), and Willie Davis (2). Telephone interviews, see infra Appendix A.

FN83. The following broadcasters indicated that they had sold stations to minorities during the past three years: Pierre Sutton (2), Howard Sanders (2), Ragan Henry (4) and Ronald Davenport (1).

FN84. Mildred Carter's family has owned one of its stations since 1950. Telephone interview, see infra Appendix A.

FN85. Mildred Carter and Ronald Davenport indicated that their families were 100% owners of their broadcasting corporations. Telephone interviews, see infra Appendix A.

FN86. Charles Sherrell, William Shearer, Howard Sanders, George Clay, Andrew Langston, Jim Hutchinson, Ronald Davenport, and Mildred Carter indicated that their business are 100% minority owned. Telephone interviews, see infra Appendix A.

FN87. Telephone interview with Pierre Sutton, see infra Appendix A.

FN88. Charles Sherrell, William Shearer, Howard Sanders, George Clay, Glenn Mahone, and Robert Lee owned between 51-54%. Telephone interviews, see infra Appendix A.

FN89. Pierre Sutton, Jim Hutchinson, and Paul Major owned between 9-38% of their corporations. Telephone interviews, see infra Appendix A.

FN90. Telephone interview with Ragan Henry, see infra Appendix A.

FN91. Among the professionals with whom I consulted and/or interviewed were: John Oxendine, President, and Kenneth Harris, Executive Vice-President, BROADCAP; Dwight Ellis, Vice-President of Minority and Special Services, National Association of Broadcasters; Pluria Marshall, National Black Media Coalition; Daniel Jaffe, Executive Vice-President, National Association of Advertisers; James Winston, Executive Director, National Association of Black-Owned Broadcasters; Rhody Bosley, Vice-President, Sales and Marketing, Radio Station Services, Arbitron; Caroline Jones, Caroline R. Jones Advertising; John Camp, Vice-President, American Association of Advertising Agencies; and Jim Blackburn, Chairman, Blackburn and Company Incorporated.

FN92. FCC Brief, supra note 22, at 32-33. The FCC indicates that stations using frequencies with the widest coverage and in the largest communities were issued during these earlier years.

FN93. Although Brown v. Board of Education, 347 U.S. 483 (1954), invalidated the "separate but equal"' doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896) (which had given judicial sanction to legalized racial segregation), it was only after the massive civil rights demonstrations in the 1960s and 1970s that change occurred. See KERNER REPORT, supra note 5, at 100, 107 (describing the development of legalized segregation in the South particularly after Plessy, and similar discrimination, whether by law or custom, in the North; and describing the impact of the Montgomery bus boycott and the student sit-ins of the 1960s).

FN94. KERNER REPORT, supra note 5, at 106 ("The South reacted to the Supreme Court's decision on school desegregation by attempting to outlaw the NAACP, intimidating civil rights leaders, calling for 'massive resistance' to the Court's decision, curtailing Negro voter registration and forming White Citizens' Councils"').

FN95. Id. at 108 ("A major factor intensifying the civil rights movement was widespread Negro unemployment and poverty. . ."').

FN96. In 1975 approximately three percent of all businesses in the United States were owned by minorities and 0.65% of the gross receipts realized by businesses were realized by minority businesses. H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2 (1975), quoted in Fullilove, 448 U.S.

at 465.

FN97. 1989 Hearing on Minority Ownership 16 (testimony of Percy Sutton), quoted in FCC Brief, supra note 22, at 33.

FN98. R.D. Bachman, Dynamics of Black Radio: A Research Report 18 (1977) (unpublished paper available in NAB Library).

FN99. Id. at 16.

FN100. Id. at 17.

FN101. See Minority Broadcast Ownership: Hearings Before the Subcomm. on Communications, Senate Comm. on Commerce, Science, and Transportation (1989) (statement of John Payton) [hereinafter Payton testimony]. Similarly, 66.6% of all commercial television stations and 91.4% of UHF stations had been allocated by June, 1973. Id.

FN102. FCC Brief, supra note 22, at 33.

FN103. Bachman, supra note 98, at 29.

FN104. Gross revenues of FM stations increased from $19.7 million to $224 million between 1964 and 1974. Id. at 29.

FN105. FCC Brief, supra note 22, at 33.

FN106. See Bachman, supra note 98 (indicating that owners realizing the great desire of African-Americans to purchase stations and the scarcity of available facilities often inflated their prices).

FN107. Hart, The Case for Minority Broadcast Ownership, GANNETT CENTER J. 54 (Winter, 1988).

FN108. Telephone interview with John Oxendine and Kenneth Harris (Apr. 20, 1989).

FN109. Telephone interview with Jim Hutchinson, see infra Appendix A.

FN110. For example, Don Cornwell, President and Chief Executive Officer of Granite Broadcasting, indicated that brokers frequently call him about available television stations. Telephone interview with Don Cornwell (Mar. 28, 1990).

FN111. Telephone interview with William Shearer, see infra Appendix A ("There is an old boy network. They [sellers] would rather sell to a large network or someone they know. We have seen this many times. Major FM stations normally go to big corporations"').

FN112. Telephone interview with Glenn Mahone, see infra Appendix A (explaining that many deals are never even made available to minority broadcasters). Ironically, similar complaints were voiced by minority broadcasters twelve years ago. See MINORITY BROADCASTING OWNERSHIP REPORT, supra note 51, at 9.

FN113. Telephone interview with Andrew Langston, see infra Appendix A (complaining that minorities never find out about sales until it's too late; and suggesting that the FCC provide more information).

FN114. Telephone interview with Mutter Evans, see infra Appendix A.

FN115. FEDERAL COMMUNICATIONS COMMISSIOM, OFFICE OF PUBLIC AFFAIRS, EEO MINORITY ENTERPRISE DIVISION, MINORITY OWNERSHIP OF BROADCAST FACILITIES: A REPORT 15 (1979)[hereinafter MINORITY OWNERSHIP OF BROADCAST FACILITIES]. All but one of the three interviewees felt that obtaining financing and the lack of available capital were the greatest problems facing minority broadcasters. Telephone interviews, see infra Appendix A.

FN116. Telephone interviews, see infra Appendix A.

FN117. MINORITY BROADCASTING OWNERSHIP REPORT, supra note 51, at 11.

FN118. Id. at 11-12.

FN119. Telephone interview with John Oxendine and Kenneth Harris, supra note 108.

FN120. A 1989 report found that African-Americans only occupied between 3-6% of the upper job classifications in the broadcasting industry. See Presentation of A. Pharr, supra note 19, at 3. Telephone interview with Skip Finley, see infra Appendix A (indicating the Catch-22 situation of many African-Americans: they need experience to get the deal financed, but there are limited opportunities to get the experience).

FN121. Telephone interview with William Shearer, see infra Appendix A.

FN122. Telephone interview with Willie Davis, see infra Appendix A.

FN123. Telephone interview with Jim Hutchinson, see infra Appendix A.

FN124. Telephone interview with Charles Sherrell, see infra Appendix A.

FN125. Telephone interview with Ragan Henry, see infra Appendix A.

FN126. Id.

FN127. MINORITY OWNERSHIP OF BROADCAST FACILITIES, supra note 115, at 19.

FN128. Id.

FN129. Id.

FN130. Id. Telephone interview with Rhody Bosley, Vice-President, Sales and Marketing, Radio Station Services, Arbitron (Apr. 4, 1990).

FN131. National Association of Broadcasters, RAMTF/Final Report (July 13, 1987) (indicating that many advertising agencies would be reluctant to accept competitive rating services since their computer software addresses only Arbitron information).

FN132. These formats are known as diaries. Households are selected based on a statistical sample of all persons over twelve years old within a metropolitan market, which roughly corresponds to a Standard Metropolitan Statistical Area (SMSA), chosen from a sample frame containing listed and a somewhat smaller mix of unlisted telephones in an area. Before diaries are mailed out, participants are asked by telephone if they will respond. Respondents must fill out the diaries correctly and return them to Arbitron within a specified period of time for their responses to be evaluated. Telephone interview with Rhody Bosley, supra note 130.

FN133. See Bachman, supra note 98 at 38 (quoting Skip Finley who complained that, although Sheridan Broadcasting's Boston station was the only Black- programmed station in the area, Arbitron had indicated that only 300 males aged 25-49 listened to the station, even though there were 40,000 African-American males in that category in the area).

FN134. MINORITY OWNERSHIP OF BROADCAST FACILITIES, supra note 115, at 21.

FN135. Telephone interviews with Cathy Hughes, Andrew Langston, Jim Hutchinson and Willie Davis, see infra Appendix A.

FN136. Telephone interview with Willie Davis, see infra Appendix A. Unlike Arbitron, Birch uses a telephone retrieval method.

FN137. Telephone interview with Andrew Langston, see infra Appendix A.

FN138. See J. DUNCAN, JR., THE RELATIONSHIP BETWEEN RADIO AUDIENCE SHARES AND REVENUE SHARES (1988).

FN139. Id. Black-formatted stations in 1987 had a mean coversion ratio of 70.7 as compared with Hispanic-formatted stations with a mean conversion ratio of 110.1; Urban/Hybrid-formatted stations with a conversion ratio of 91.6; and MOR/Full Service stations with a conversion ratio of 132.4.

FN140. According to Duncan, a Black-formatted station would typically be expected to convert about 70.7% of its audience share into advertising dollars, while a country-formatted station could convert 116%. J. DUNCAN, supra note 138.

FN141. Telephone interview with Glenn Mahone, see infra Appendix A.
FN142. Telephone interview with James Winston, supra note 2.

FN143. Telephone interview with William Shearer, see infra Appendix A.

FN144. Telephone interview with John Camp, Vice-President, American Association of Advertising Agencies (Apr. 6, 1990).

FN145. Telephone interview with Caroline Jones, Caroline R. Jones Advertising (Apr. 4, 1990).

FN146. Telephone interview with John Camp, supra note 144.

FN147. Minority Owned Broadcast Stations The Advertising Revenue Crisis: Hearings Before the Subcomm. on Telecommunications of the House Comm. on Energy and Commerce, 99th Cong., 2nd Sess. 3-4 (1986) (statement of Waynett A. Sobers, Jr.).

FN148. Telephone interview with Caroline Jones, supra note 145. "To track sales"' means that a client expects to see a discernible increase in sales of its product to the targeted group.

FN149. Telephone interview with George Clay, see infra Appendix A.

FN150. Telephone interview with Mutter Evans, see infra Appendix A.

FN151. Telephone interview with Cathy Hughes, see infra Appendix A.

FN152. Telephone interview with Ragan Henry, see infra Appendix A.

FN153. See Bronner, Court Hears Challenge to FCC's Minority Preference, Boston Globe, Mar. 29, 1990 at 3, col. 1. (where Justice Scalia objected to "skin color as a guide to taste"').

FN154. See Associated Press, 326 U.S. at 20. (First Amendment rests on assumption that the dissemination of diverse viewpoints is essential to the public welfare).

FN155. See KERNER REPORT, supra note 5, at 211 (indicating that the media must employ more African-Americans to have a better link with their ideas).

FN156. Telephone interviews, see infra Appendix A.

FN157. CONGRESSIONAL RESEARCH SERVICE, MINORITY BROADCAST STATION OWNERSHIP AND BROADCAST PROGRAMMING: IS THERE A NEXUS, at Appendix (1988). The study found that the greater the African-American ownership, the more likely the programming will be targeted towards an African-American audience.

FN158. NAB FACTS, supra note 22, at 12.

FN159. Telephone interview with Andrew Langston, see infra Appendix A.
FN160. Telephone interview with Mildred Carter, see infra Appendix A.

FN161. See generally S. Finley, Statement before the Federal Communications Commission

(Apr. 1977).

FN162. See J. DUNCAN, JR., supra note 138 and accompanying text.

FN163. This represents about 32 of the 54 stations.

FN164. NAB FACTS, supra note 22, at 12.

FN165. Bachman, supra note 98 at 13, 57.

FN166. Id. at 58.

FN167. J. Jeter, A Comparative Analysis of the Programming Practice of Black- owned Black-oriented Radio Stations and White-owned, Black-oriented Radio Stations, (1981) (Ph.d. dissertation, University of Wisconsin).

FN168. Id. at 145.

FN169. M. Fife, The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content, (1986) (unpublished paper in the NAB Library).

FN170. Id. at 45.

FN171. Charles Sherrell, Paul Major, Jim Hutchinson, Willie Davis (throughout his broadcasting corporation), Howard Sanders, George Clay, Ronald Davenport, Glenn Mahone, Cathy Hughes, William Shearer, Mutter Evans, Pierre Sutton (in New York) and Bennie Turner reported that they had over 70% minority employees. Telephone interviews, see infra Appendix A.

FN172. Mutter Evans, Bennie Turner, Howard Sanders, George Clay, Glenn Mahone, Cathy Hughes, Charles Sherrell and Jim Hutchinson reported more than 80% minority employees. Telephone interviews, see infra Appendix A.

FN173. P. Gold, Public Interest Programming Service to Minority Committee by Minority-Oriented Commercial Radio Stations 14 (1983) (unpublished paper in the NAB Library).

FN174. Id.

FN175. Telephone interview with Ragan Henry, see infra Appendix A.

FN176. Telephone interview with Ronald Davenport, see infra Appendix A.

FN177. Telephone interview with Nancy Waters, see infra Appendix A.

FN178. Telephone interview with Mutter Evans, see infra Appendix A.

FN179. Telephone interview with Nancy Waters, see infra Appendix A.

FN180. Telephone interviews, see infra Appendix A.

FN181. Telephone interview with Jim Hutchinson, see infra Appendix A.

FN182. Telephone interview with Willie Davis, see infra Appendix A.

FN183. Telephone interview with Bennie Turner, see infra Appendix A.

FN184. Telephone interview with Nancy Waters, see infra Appendix A. However, when Ms. Waters applied initially, she made no effort to obtain a preference because of her race or gender.

FN185. Telephone interview with Jim Blackburn, see infra Appendix A.

FN186. Telephone interview with James L. Winston, supra note 2.

FN187. Telephone interview with Glenn Mahone, see infra at Appendix A.
8 YLLPR 380
END OF DOCUMENT

68 F.C.C.2d 979
1978 WL 36317 (F.C.C.)

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

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'), [FN1] 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. [FN2] 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.' [FN3]

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.' [FN4] 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:

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. [FN5]

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. . . .

[W]e 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. [FN6]

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 [FN7] 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 [FN8] continue to be inadequately represented in the broadcast media. [FN9] This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

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. [FN10]

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.' [FN11] 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.

* *

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. [FN12]

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. [FN13]

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. [FN14]

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. [FN15] The Commission itself has ordered the expedited processing of several applications filed by applicants with significant minority ownership interests. [FN16]

Nevertheless, the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action. [FN17] 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, [FN18] we intend to examine such applications where a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased. In such circumstances, we will make use of our authority to grant tax certificates [FN19] to the assignors or transferors where we find it appropriate to advance our policy of increasing minority ownership. [FN20] 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 [FN21] 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.

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. [FN22]

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

FN1 Report of the National Advisory Commission on Civil Disorders (New York: Bantam Books, 1968).

FN2 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.')

FN3 Id. at 769.

FN4 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).

FN5 Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354, 358 (1975).

FN6 Nondiscrimination in the Employment Polices and Practices of Broadcast Licensees, 60 FCC 2d 226, 229-230 (1976).

FN7 Ascertainment of Community Problems by Broadcast Applicants, 57 FCC 2d 418 (1976).

FN8 For purposes of this statement, minorities include those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.
FN9 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.

FN10 Minority Ownership Report, supra.

FN11 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 394 (1965).

FN12 447 F.2d at 1213 n. 36.

FN13 495 F.2d at 937-38 (emphasis added).

FN14 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), 1056, 1063 (D.C. Cir. 1975) (footnote omitted).

FN15 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).

FN16 Atlass 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.

FN17 For a general treatment of the growth of Black-owned radio, see Bachman, Dynamics of Black Radio, (1977).

FN18 See Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. s 310(b).

FN19 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 diversiture 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).

FN20 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.

FN21 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); Northestern Broadcasting Corporation (WLTH), 65 FCC 2d 66 (1977).

FN22 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.
FCC
68 F.C.C.2d 979, 1978 WL 36317 (F.C.C.)
END OF DOCUMENT

92 F.C.C.2d 849
1982 WL 190429 (F.C.C.)

Minority Ownership
Minority Ownership of Broadcast Facilities

Commission will now consider issuing tax certificates and authorizing distress sales in transfers to limited partnerships where the minority general partner owns at least twenty percent of the b/c entity. Additionally, the Commission will consider issuing tax certificates to shareholders that divest their interest in a minority-controlled entity when divestiture furthers minority ownership.

--Minority Ownership in B/cing
Gen. Docket No. 82-797

FCC 82-523

In the Matter of
Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting

Gen. Docket No. 82-797

POLICY STATEMENT AND NOTICE OF PROPOSED RULE MAKING

Adopted: December 2, 1982; Released: December 13, 1982
BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT.

Introduction

1. The Commission has traditionally considered the under-representation of minority points of view over the airwaves as detrimental to minorities [FN1] 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. [FN2] 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, [FN3] and ascertainment procedures requiring licensees to conduct discussions with significant groups, including minority leaders, in the community. [FN4] However, it became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional measures were necessary. In our

Statement of Policy on Minority Ownership of Broadcasting Facilities (hereinafter cited as the 1978 Policy Statement), [FN5] 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. [FN6] Tax certificates are authorized, under 26 U.S.C. s 1071, in sales or exchanges of broadcasting properties where the Commission determines that such sales or exchanges 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 U.S.C. s 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 U.S.C. s 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. [FN7] 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. [FN8]

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.' [FN9] Additionally, the Commission has indicated that waivers of the trafficking rule [FN10] and the multiple ownership rules [FN11] would be considered and might be appropriate where minority ownership is thereby increased. [FN12] Moreover, we have in fact waived our requirements [FN13] and awarded comparative merit to minority applicants [FN14] 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. [FN15]

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 share holders 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 delegation 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; [FN16] and

(6) amend the multiple ownership rules to permit established broadcasting entrepreneurs to acquire equity interests in minority-controlled entities. [FN17]

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 enterpreneurship 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. [FN18] The same ownership requirement has since been applied to distress sales. [FN19] 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. [FN20] 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 sold 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 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. [FN21] 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. [FN22] 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. [FN23] 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. [FN24]

10. In Anax Broadcasting, Inc., [FN25] 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). [FN26] 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.' [FN27]

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 partnership 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. [FN28] 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. [FN29] Moreover, we are increasing minority 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 the 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.' [FN30] While the Advisory Committee recognized that tax certificates have successfully contributed to the acquisition of broadcast properties by minorities, [FN31] 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 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 sale 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. [FN32]

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 1971.' [FN33]

14. Section 1071 of the Internal Revenue Code confers broad jurisdictional powers upon the Commission, normally reserved to the Treasury, to issue tax certificates. [FN34] 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 properties. 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, [FN35] 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. [FN36] 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' requirements. [FN37] In 1978, we further expaneded our tax certificate policy by announcing the availability of such certificates in transactions that further minority ownership. [FN38]

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. [FN39] However, ur 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 issurance, which allows for the stabilization of the entity's capital base. (The Committee's recommendations did not include any time limitation.) We believe that to extend the availability fo 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. [FN40]

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. [FN41] 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. [FN42] 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. [FN43]

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. [FN44] Therefore, to further facilitate minority ownership 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, [FN45] 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. [FN46] Although a seller-creditor currently may take a security interest in the station's physical assets or stock in the corporate licensee [FN47] 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 [FN48] and affirmed by the United States Supreme Court, [FN49] that a broadcast license is a valuable, though limited, privilage 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. [FN50] This principle appears to be dictated by the Communications Act of 1934, as amended. Specifically, 47 U.S.C. s 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 U.S.C. s 304 requires an applicant for a licensis 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 U.S.C. s 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 U.S.C. s 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 C.F.R. s 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. [FN51]

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.

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 U.S.C. s 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 licenses-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 non-restricted 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, the 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, Section 1.1231 of the Commission's Rules and Regulations, 47 C.F.R. s 1.1231.

25. Pursuant to applicable procedures set out in Sections 1.4, 1.415 and 1.419 of the Commission's Rules and Regulations, 47 C.F.R. s 1.4, s 1.415 and s 1.419, interested parties may file comments on or before March 14, 1983 and reply comments on or before March 29, 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 Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. s 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.

FEDERAL COMMUNICATIONS COMMISSION
William J. Tricarico Secretary

FN1 For purposes of this statement, the term 'minority' includes American Indians or Alaskan Natives, Asians and Pacific Islanders, Blacks and Hispanics. 47 U.S.C. s 309(i)(3)(C).

FN2 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 U.S. 1, 20 (1943).

FN3 See 47 C.F.R. ss 73.125, 73.301, 73.599, 73.680, and 73.793; see also Nondiscrimination in Employment Practices of Broadcast Licensees, 13 F.C.C. 2d 766, 774 (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 Fed. Reg. 21468 (May 18, 1982), and direct broadcast satellite systems, Report and Order, 47 Fed. Reg. 31553 (July 21, 1982). See also Nondiscrimination Employment Practices of Broadcast Licensees, 54 F.C.C. 2d 354, 356 (1975).

FN4 Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418, 419 (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 F.C.C. 2d 968, 978 (1981). We cautioned that such discrimination would be viewed with 'utmost gravity.' Id. at 1089.

FN5 68 F.C.C. 2d 979, 980-981 (1978).

FN6 For a more detailed discussion of tax certificates, see paragraph 13, infra, and of distress sales, see paragraph 19, infra.

FN7 Bartell Broadcasting of Florida, Inc., 45 RR 2d 1329, 1331 (1979).

FN8 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 F.C.C. 2d 429, 431 n. 6 (1980).

FN9 TV 9, Inc. v. FCC, 495 F. 2d 929, 937-938 (D.C. Cir. 1973) cert. den., 418 U.S. 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.

FN10 47 C.F.R. ss 73.35, 73.240 and s 73.636.

FN11 47 C.F.R. s 73.3597.

FN12 Minority Ownership of Broadcasting Facilities, 69 F.C.C. 2d 1591, 1596- 1597 (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.

FN13 E.g., in Atlass Communications, Inc., 61 F.C.C. 2d 995, 997 (1976), the allocation requirements were waived and a Black-owned daytime broadcast station was permitted to operate at night.

FN14 E.g., in Rosemor Broadcasting, Co., Inc., 54 F.C.C. 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.

FN15 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.

FN16 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).

FN17 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.

FN18 1978 Policy Statement, supra, at 983, n. 20.

FN19 E.g., Grayson Enterprises, Inc., 47 RR 2d 287, 294 (1980).

FN20 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.

FN21 68 Corpus Juris Secundum, Partnership, s 449-450.

FN22 Evans v. Galardi, 546 P. 2d 313, 317 (1976).

FN23 Id. at 318.

FN24 Hirsch v. DuPont, 396 F. Supp. 1214 (S.D. Calif. 1975), affirmed, 553 F.2d 750 (1975); Lichtyger v. Franchard Corp., 223 N.E. 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 F. 2d 713, 715 (9th Cir. 1953), cert. den., 345 U.S. 975 (1953).

FN25 49 RR 2d 1589 (1981).

FN26 Id. at 1593-1594.

FN27 Id. at 1593.

FN28 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.

FN29 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 F.C.C. 2d 713, 715 (1981).

FN30 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).

FN31 See paragraph 5, supra.

FN32 Final Report, supra at 8.

FN33 Id. at 9.

FN34 Blake and McKenna, Section 1071: Deferral of Tax on FCC Sanctioned Dispositions of Communications Properties, 36 Tax L. Rev. 101, 103 (Fall 1980).

FN35 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 (W.D.N.C. 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 deferment 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.

FN36 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 occurence 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 1831, 1832 (1970).

FN37 In re Issuance of Tax Certificates, 59 F.C.C. 2d 91 (1976).

FN38 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 C.F.R. 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.

FN39 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).

FN40 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%.

FN41 William S. Green, 59 F.C.C. 2d 78, 79 (1979); J.A.W. Iglehart, 38 F.C.C. 2d 541, 542 (1972).

FN42 1978 Policy Statement, supra at 983.

FN43 Id. at 983.

FN44 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 F.C.C. 2d 156, 163-164 (1980); Northland Television, Inc., 72 F.C.C. 2d 51- 54-56 (1979).

FN45 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.

FN46 According to the Committee, '[i]n 1981, of the 487 station transfer 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.).

FN47 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 U.S.C. s 310.

FN48 See, eg., Churchill Tabernacle v. FCC, 160 F. 2d 244 (D.C. Cir. 1947); Radio KDAN, Inc., 11 F.C.C. 2d 934 (1968); Yankee Network, Inc., 13 F.C.C. 1014 (1949), Bonanza Broadcasting Corp., 11 RR 2d 1072 (1967); Alabama Polytechnic Institute, 7 F.C.C. 225 (1939); Associated Broadcasters Inc., 6 F.C.C. 387 (1938).

FN49 Ashbacker Radio Corp., v. FCC, 326 U.S. 327, 331-32 (1945); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

FN50 For instance, in Radio KOAN, 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).

FN51 Specifically, s 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 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.

FCC

92 F.C.C.2d 849, 1982 WL 190429 (F.C.C.)

END OF DOCUMENT

FCC 82-524

Policy Statement on Minority Ownership of Cable Television Facilities) 1472 Public Notice December 22, 1982

[¶32:1, ¶53:24(R)(27), ¶85:501] Minority ownership of cable systems.

Believing that minority ownership of cable television systems is a significant additional means of fostering the inclusion of minority views in programming, and noting the relative scarcity of minority owned cable systems presently in operation, the Commission adopts a policy of encouraging minority ownership of cable systems, utilizing the Commission's tax certificate authority as a form of subsidization of minority entrepreneurs seeking to enter the cable television market. Minority Ownership of Cable Television Facilities, 52 RR 2d 1469 [1982].

By the Commission:

The Commission has traditionally recognized that the public interest is enhanced when available programming reflects a diversity of viewpoints, including the viewpoints of racial and ethnic minority groups. See N. A. A. C. P. v. F. P. C., 425 US 662, 670 n. 7 (1976). 1/

In the broadcast area, we first attempted to ensure adequate representation of minority viewpoints through a number of means, including the establishment of equal employment opportunity 2/ and ascertainment requirements, 3/ the awarding of merit in comparative hearings, 4/ and by indicating our willingness to waive, upon a proper showing, our trafficking 5/ and multiple ownership rules. 6/ In May 1978, we announced the use of other means for encouraging minority ownership of broadcasting facilities. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 [42 RR 2d 1689] (1978). As detailed therein, the Commission discussed why additional measures were necessary to ensure that there was adequate representation of minority views in available programming. Id. at 981.

This minority ownership policy was implemented chiefly by means of two available regulatory tools: our tax certificate authority 7/ and our distress sale policy. As discussed in

---

1/ For purposes of this policy statement, racial minorities include Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

2/ Nondiscrimination Employment Practices of Broadcast Licensees, 13 FCC 2d 766 [13 RR 2d 1645] (1968); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354 (1975); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226 [37 RR 2d 1641] (1976).

3/ Ascertainment of Community Problems by Broadcast Applicants, 57 FCC 2d 418 (1976).

4/ Rosemar Broadcasting Co., Inc., 54 FCC 2d 394 (1975); TV 9, Inc. v. FCC, 495 F2d 929 [28 RR 2d 1115; supp. op., 29 RR 2d 963] (DC Cir. 1973).

5/ 47 CFR §73.3597.

6/ 47 CFR §§73.35, 73.240 and 73.636.

7/ Section 1071 of the Internal Revenue Code authorizes the Commission to issue tax certificates which enable sellers of qualifying property to defer federal tax on capital gains resulting from such sales. 26 USC §1071.

a companion item also adopted today, 8/ the tax certificate program has led to an increase in the number of broadcast stations owned by minorities. 9/ Thus, the tax certificate has proven effective in promoting our objective.

The Commission's commitment to encouraging minority participation in the field of communications is a continuing one. Accordingly, we established an Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the Advisory Committee), to provide us with additional guidance in this area. One of the recommendations advanced by that committee was that the Commission turn its attention to minority participation in the cable television industry. See Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the "Final Report"), May 1982, at 7.

The functions that cable television system operators perform for their subscribers are, to a large degree, similar to those performed by broadcast licensees for their respective audiences. FCC v. Midwest Video Corp., 440 US 689, 707 [45 RR 2d 581] (1979). For example, cable television system operators may exercise discretion in determining which broadcast and non-broadcast signals they will carry, as well as in selecting pay programming from alternative sources. Additionally, they may engage in program origination. Id. Because cable operators, like broadcasters, exercise discretion in their choice of programming the Commission has taken steps, in the past, to maximize the diversity of programming carried by cable television systems. 10/ For example, in furtherance of this objective we, at one time, adopted rules requiring cable television systems to engage in program origination. First CATV Report and Order, 20 FCC 2d 201 [17 RR 2d 1570] (1969), aff'd, U.S. v. Midwest Video Corp., 406 US 649 [24 RR 2d 2072] (1972). In addition, the Commission in the past has used broad proscriptions on cross-ownership as one approach intended to promote program diversity. See Second Report and Order in Docket 18397, 23 FCC 2d 816 [19 RR 2d 1775] (1970).

Also in connection with this goal, we have attempted to ensure that the viewpoints of minorities are adequately represented in cable television system programming. Thus, in 1976 we encouraged cable television systems to carry foreign language programming by exempting such programs from limitations otherwise placed upon the carriage of signals from distant non-network stations. Specialty Stations, 58 FCC 2d 442 [36 RR 2d 781] (1976). Additionally, ten years ago we established EEO and affirmative action guidelines for cable television system operators. Cable Television Discriminatory Employment Practices, 34 FCC 2d 186 [24 RR 2d 1629] (1972); Nondiscrimination – CATV Employment Practices, 69 FCC 2d 1324 [44 RR 2d 839] (1978). See also 47 CFR §76.311. 11/ In promulgating these rules we noted that:

> "Cable, by virtue of its multi-channel capacity, is uniquely capable of serving the special programming and other communications needs of discriminated against minority groups. But a company which is not an equal opportunity employer is less likely than it otherwise would be to recognize and respond to those needs. In light of this fact . . . it would certainly be improper for the Commission to countenance discriminatory employment practices by cable systems at the same time as it forbids such practices by broadcast . . . facilities." 34 FCC 2d at 190-191.

8/ Statement of [illegible] on Minority Ownership of Broadcasting Facilities, FCC 82-523 [52 RR 2d 130[illegible]] adopted today.

9/ To date, we have granted fifty-five (55) tax certificates in furtherance of our minority ownership policy.

10/ The Commission's authority to regulate cable television with a view toward promoting broadcasting objectives is well established. U.S. v. Midwest Video Corp., 406 US 649 [24 RR 2d 2072] (1972). See also U.S. v. Southwestern Cable Co., 392 US 157 [13 RR 2d 2045] (1968); Second CATV Report and Order, 2 FCC 2d 725 [6 RR 2d 1717] (1966).

11/ These EEO requirements apply to operators of cable television systems both in that capacity and as licensees and permittees of CARS stations. See 69 FCC 2d 1324 n. 2, supra.

Available statistics indicate that the cable television industry has increased, to some extent, the percentage of minorities it employs. 12/ However, and quite analogous to the situation we faced four years ago in the broadcast industry, we are compelled to observe that minorities continue to be underrepresented in the ownership of cable television systems. Thus, diversity of ownership cannot effectively operate as a means of ensuring that the views of minorities are reflected in the programming decisions for cable television systems. 13/

As in broadcasting, adequate representation of minority views in cable television programming enhances the goal of diversified programming which is an objective of both the Communications Act of 1934 and of the First Amendment. Moreover, because cable television system operators exercise editorial discretion with respect to broadcast program selection and cable origination programming, insensitivity on their part to minority issues and viewpoints could undercut our continuing efforts to increase the diversity of viewpoints in programming. Thus, despite our previous efforts to ensure program diversity, it appears that additional measures in the area of cable television are appropriate.

The Commission now believes that minority ownership of cable television systems is an additional significant means of fostering the inclusion of minority views in programming. It is apparent that few cable television systems are currently owned by minorities: approximately 45 of the more than 15,000 existing cable television system franchises are held by minority-controlled business concerns. 14/ As in the broadcast area, we believe that an increase in minority ownership and management of cable television facilities would result in a more diverse selection of programming. We favor stressing ownership as a means of furthering program diversity because this approach does not require direct governmental intrusion into programming decisions.

The Advisory Committee has recommended that we begin using our tax certificate authority to promote minority ownership of cable television systems. Final Report at 7. Noting that the lack of adequate financing remains "the single greatest obstacle" to minority ownership of communications facilities, the Advisory Committee concluded that issuing tax certificates for sales of cable television systems to minority purchasers could greatly facilitate minority ownership of these facilities. Id. 15/

12/ See FCC News Release, "1981 Cable Television Employment Statistics and Trend Report" released October 26, 1982, showing minority employment by operating cable television systems to be at 13.9% (up from 11.7% in 1978), and minority employment at central corporate-type offices to be at 14.0% (up from 12.9% in 1978).

13/ See Enterprise Opportunities for Minorities in Telecommunications: Transcript of Proceedings at the Federal Communications Commission ("Enterprise Opportunities Transcript"), December 1980, at 390-406; Cable Television Industry: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business ("Cable Television Hearings"), 97th Cong., 1st Sess. 122, 223 (1981).

14/ Data supplied by the National Cable Television Association.

15/ Section 1071 authorizes the Commission to issue tax certificates when we find a sale or exchange of property to be "necessary or appropriate" to effectuate our policies "with respect to the ownership and control of radio broadcasting stations." 26 USC §1071. In the past, we have issued tax certificates for sales of cable television systems when we found those sales to be in furtherance of our cross-ownership policies. See Cosmos Cablevision Corp., 33 FCC 2d 293 [23 RR 2d 754] (1972); King Videocable Co., 49 FCC 2d 1297 [32 RR 2d 155] (1974); J. A. W. Iglehart, 38 FCC 2d 541 [26 RR 2d 6] (1972) [all of which were in furtherance of the Commission's broadcast/cable cross-ownership rules]. See also Continental Telephone Corp., 51 FCC 2d 284 [32 RR 2d 1203] (1975); General Telephone & Electronics, 51 FCC 2d 502 (1975) [in furtherance of the Commission's telephone/cable cross-ownership rules]. And see Policy Statement on Issuance of Tax Certificates, FCC 82-497, adopted November 4, 1982 [52 RR 2d 757].

After due consideration of the Advisory Committee's recommendation, and in light of the current dearth of minority-owned cable systems, we now adopt a policy encouraging minority ownership of cable television systems. This new policy will be implemented by means of our tax certification authority. Henceforth, we will consider requests for tax certificates from owners of cable television systems who have sold their interests to minority-controlled entities. 16/

As the Advisory Committee has noted, "a tax certificate effectively subsidizes the bargaining position of minority entrepreneurs seeking to enter the telecommunications market." Final Report at 8. By utilizing our tax certificate authority in this fashion, we hope to assist minority entrepreneurs in becoming owners of cable television systems and thus to enhance the presentation of minority viewpoints in programming decision of cable television systems. 17/

We are keenly aware that this new policy will not in itself assure that minority viewpoints are adequately represented in cable television programming. This step we take today, however, is made possible because proposals raising this issue were submitted to us, and these proposals, the comments received thereon, the findings made by the Advisory Committee and the record established during the Commission's Minority Enterprise Conference 18/ provide a persuasive record upon which we may act. We remain committed to the goal of promoting the expression of diverse viewpoints in cable television programming, and we look upon this and the related actions taken today as significant new ways of advancing this institutional objective.

Action by the Commission December 2, 1982. Commissioners Fowler (Chairman), Quello, Fogarty, Jones, Dawson, Rivera and Sharp, with Chairman Fowler issuing a separate statement.

SEPARATE STATEMENT OF CHAIRMAN 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 road blocks 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.

16/ By our action today, we expressly incorporate the modifications to our tax certificate policy set forth in the expanded Statement of Policy on Minority Ownership of Broadcasting Facilities we have adopted today. Specifically, we will consider issuing tax certificates in transfers to limited partnerships where the general partner (or partners) owns more than 20% of the interests in the cable television system and is a member of a minority group. See FCC 82-523. Additionally, we will consider issuing tax certificates to shareholders upon sales of their interests in a minority-controlled cable television system, when these sales further minority ownership. Id.

17/ This Policy Statement addresses only cable television systems. It is possible, however, that similar considerations may lead us in the future to extend this program to other services where licensees exercise significant editorial discretion over programming transmitted by their facilities.

18/ See note 13, supra.

A request for the issuance of a tax certificate under the Commission's minority ownership policy statement (68 FCC 2d 979), in connection with voluntary transfer of control of a b/c license, denied. The extent of ownership and participation by minorities is not significant enough to warrant the issuance of a tax certificate.

FCC 79-203

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of Nevada Independent Broadcasting Corporation William H. Hernstadt, Judith F. Hernstadt, et al. (Transferors) and Carson Broadcasting Corporation (Transferee) For the voluntary transfer of control of the licensee of station KVVU-TV (Channel 5), Henderson, Nevada	File No. BTC-780929KP

MEMORANDUM OPINION AND ORDER

(Adopted: March 30, 1979; Released: April 12, 1979)

BY THE COMMISSION: COMMISSIONERS FERRIS, CHAIRMAN; FOGARTY AND BROWN ISSUING SEPARATE STATEMENTS; COMMISSIONER LEE ABSENT; COMMISSIONERS QUELLO AND WASHBURN DISSENTING.

1. The Commission has for consideration (a) the above-captioned application; and (b) a request by the licensee, filed October 11, 1978, for the issuance of a tax certificate pursuant to section 1071 of the Internal Revenue Code (26 U.S.C. 1071) and the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (hereinafter "Statement").

2. In the *Statement* we stated:

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

transferors where we find it appropriate to advance our policy of increasing minority ownership.

We went on to say in footnote 20:

. . .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.

3. Carson Broadcasting Corporation (hereinafter "Carson"), the proposed transferee, has represented that it has significant minority involvement for the following reasons: (1) 30% of the Carson stock is owned by minority principals: Forrest Chu, an Asian-American (16.5%); Patrick Lee, an Asian-American (4.5%); and John J. Doria, a Mexican-American (9.0%);[1] (2) all three minority principals are members of a seven man board of directors, thus making up 43% of the Board; (3) Mr. Chu, also a vice-president, will hold the position of director of station operations and will be present at the station four business days each week and will be in charge of various station committees; (4) the station's proposed personnel committee will be comprised of Mr. Chu, Mr. Lee and Rusty Durante, the station manager. The committee's avowed purpose is to direct the formulation of hiring, training and promotion policies of the station as well as oversee the development and implementation of a program to bring local minority individuals into the broadcast industry through KVVU-TV; (5) the station's proposed programming committee consists of Mr. Chu, Mr. Doria, and Mr. Durante. This committee's alleged purpose is to develop programming responsive to the needs and interests of the community including, specifically the acquisition and development of programming of benefit to children and minorities; (6) the station's proposed community relations committee is composed of Mr. Chu, Mr. Lee, Herbert Kaufman (the president of both Carson Broadcasting and a department store chain) and a resident of the local community. This committee is charged with establishing and maintaining ongoing contacts with leaders in KVVU-TV's community of license and service area. This committee is also responsible for focusing the efforts of the personnel committee and the programming committee and developing a program which will open careers in the broadcast industry to members of the local minority population. Carson has also represented that a $500,000 line of credit it has arranged with Citibank, N.A. will be used to fund programming to meet the needs of the Henderson-Las Vegas area, especially minorities and youth, if such money is not required to be used for the purchase of the station.[2] In view of these factors, Carson submits that it has significant enough minority involvement to merit the issuance of a tax certificate. We believe that the transferee's minority ownership and participation is not significant enough to merit the issuance of a tax certificate.

4. When we adopted the *Statement*, we noted that the views of racial minorities continue to be represented inadequately in the broadcast media. We concluded that this situation was detrimental not only to minority audiences but to non-minority audiences as well, since minority viewpoints in programming serve not only the needs and interests of the minority community but also enrich and educate the non-minority audience. As such, we have attempted to promote diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

5. We again emphasize that we are guided by the decision of the Court of Appeals in *TV 9, Inc. v. FCC*, 495 F. 2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974). There the Court held that when *minority ownership* is likely to increase programming diversity, awarding additional weight for this factor was an appropriate method to effectuate programming diversity. The Court further stated that "it is upon *ownership* that public policy places primary reliance with respect to diversification of content. . .", *supra*, at 937–38. (Emphasis added). The statement followed this approach, placing primary emphasis on sales "to parties with a significant minority interest [such that] there is a substantial likelihood that diversity of programming will be increased." *Statement*, at 982–83. Thus it was specified in the *Statement* that the award of tax certificates would be most appropriate in those situations in which the minority buyer held outright a 51% controlling interest. Footnote 20 in the *Statement* reflects that approach. The Commission, however, retained the flexibility to consider situations in which the minority interest was less than 50% but tantamount to control.

6. Obviously, the 30% stock ownership position held by minorities in the Carson application does not constitute an outright majority interest in the buyer. The question then becomes whether "minority involvement is significant enough to justify the certificate in light of the purpose of the policy announced [in the *Statement*]. . ." *Statement*, at 983, n. 20.

7. As expressed in the *Statement*, the Commission's goal here is to increase the probability of program diversity through minority ownership and control. Following the directive of the Court in *TV-9*, *supra*, the Commission did not intend to award certificates simply because an applicant proposed minority programs. Otherwise, the Commission would have to closely monitor a station's programming and this would substantially involve the Commission in program decision-making. This

[1] The remaining 70% is owned as follows: John W. Carson (30%); Herbert Kaufman (30%); Gordon Baskin (5%); Henry I. Bushkin (2%); Arnold Kopelson (1%); Frederick Gaines (1%); John Gaims (1%).

[2] Article II, section 2.02 of the agreement for sale provides that the total purchase price shall be $5,500,000; ". . .provided, however, in the event the Commission issues to the Stockholders a Tax Certificate as a result of Minority Participation in the equity and/or management of Buyer, then the. . .total purchase price [will be lowered] to Five Million Dollars. . ."

result, in turn, would directly conflict with one of the principal purposes of increased minority ownership—maximizing the capacity for program diversity *without* intrusion into sensitive First Amendment areas. *Statement*, at 981. Moreover, a licensee cannot abdicate control over programming; hence, even the appointment of a minority to program director or station manager would, by itself, be insufficient to demonstrate minority control of programming. Likewise, we did not intend to award certificates to applicants with minority principals who were subject to the control of non-minority principals; otherwise, we could not be assured that the minority ownership would be translated into the kind of diversity sought in the *Statement*. *Conversely*, the certificate could be awarded if that assurance could be provided by an applicant whose minority principals have less than majority control. For example, in *William M. Barnard*, 44 RR 2d. 525 (1978), the Commission granted a tax certificate where minority individuals only held a 45.5% interest in the assignee, a limited partnership. However, the sole general partner owned a substantial partnership interest and was a minority group member. By operation of law, that general partner had exclusive control over station affairs. Thus, despite the absence of a majority ownership interest being held by a minority, the Commission granted the tax certificate on the strength of, *inter alia*, its finding that a minority individual would control the station's operation, by virtue of being its sole general partner.

8. Unlike *Barnard*, Carson fails to show that minority individuals will exercise control over station operations. Although minority ownership and participation in Carson is certainly commendable, it does not satisfy the standard established in the *Statement*. Since Carson's three minority principals will be members of a seven-person board of directors, it is clear those principals will not control that board. Further, Carson states that one minority principal will be "director of station operations" but does not clearly describe the responsibilities accompanying that title. We also note that a non-minority individual will be "station manager", which may be a higher-level management position than "director of station operations."

9. However, even assuming *arguendo* that the "director of station operations" will be the chief executive officer at the station, that officer as well as all other station employees would be and, under Commission policy, must be subject to the overall control of the Board of Directors. Furthermore, all station employees would be subject to dismissal by the Board. In sum, Carson has failed to demonstrate that its minority principals will exercise permanent control over station operations. A persuasive showing of permanent minority control is required so that the Commission may avoid the intrusive and time-consuming task of monitoring station programming and personnel decisions in the future to insure compliance with the policy under which the tax certificate was granted. Since there is no reasonable basis for finding minority control of station operations here, we cannot say that our goal of

increased program diversity is likely to be achieved. Therefore, we decline to issue a tax certificate.

10. The transferors and transferees are otherwise qualified to effectuate the proposed transaction and a grant of the application (BTC-780929KP) for the voluntary transfer of control of KVVU-TV, Henderson, Nevada, to Carson Broadcasting Corporation would serve the public interest. Accordingly, IT IS ORDERED, that the application IS GRANTED. IT IS FURTHER ORDERED, that the request for a tax certificate, filed October 11, 1978, by Nevada Independent Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

SEPARATE STATEMENT OF CHAIRMAN CHARLES D. FERRIS

IN RE APPLICATION OF NEVADA INDEPENDENT BROADCASTING CORPORATION

In this case a tax certificate was sought under the Commission's 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, for the sale of television station KVVU-TV, Henderson, Nevada, to Carson Broadcasting Corporation (Carson). Minorities hold a 30% stock ownership interest in Carson. I voted with the majority to deny the tax certificate.

There are two tests in the FCC's 1978 *Statement* for determining whether there is enough minority involvement in the proposed purchaser to warrant the grant of a certificate to the seller. The FCC gives primary consideration to granting a certificate where the minority interest is greater than 50%. *Statement* at 983, n. 20. Certificates may also be awarded in instances where the "minority involvement [in the purchaser] is [otherwise] significant enough to justify the certificate in light of the purpose of the policy. . . ." *Id.* The parties must show that a sale creates "a substantial likelihood that diversity of programming [would] be increased. . . ." *Statement* at 982–83.

Our tax certificate policy, as it relates to minorities, is founded on the judicially approved presumption that significant minority participation in the structure of ownership of broadcast stations will translate into increased program diversity for the audience. Thus it furthers important First Amendment goals. As the decision correctly notes, however, the use of a more subjective approach, not based on structural considerations, would require the Commission to venture deeply into direct monitoring to determine actual minority participation in program decisions. We should seek to avoid if possible any policy that requires such detailed intervention into content, for then the First Amendment costs might outweigh the gains.

I agree with Commissioner Brown that the *TV-9* case[1] should not be read as requiring absolute minority control in all cases before any special recognition based on minority involvement becomes warranted by the Commission. But, in the absence of outright majority stockholder control, I believe that for tax certificate purposes minorities must have sufficient ownership interest or operational control of a station that their participation cannot evaporate at the whim of a majority of the board of directors or a change in the station's general manager.

We must be careful to use wisely our tax certificate authority—which grants in effect public funds by deferring income the government would otherwise receive. We must, in my view, be convinced that the gain in potential diversity to the public that we seek to achieve from the grant is secure. We should not dilute our standards and expectations so early in our experience in this field.

The concern has been expressed that this cautious approach will deny minorities access to major market television stations where a controlling interest might cost many millions. I believe, however, that even under a "control" standard minority entrepreneurs can find ample creative and flexible tools of corporate and partnership structure to obtain adequate financing while retaining a firm hold on the station's policies. See, e.g., *William M. Barnard* 44 RR 2d 525 (1978).

In addition, large capital investment pools for minorities are now being formed by both private and government sources.

The Small Business Administration began last year to make loans to minority buyers of broadcast stations. Syndicated Communications, Inc. (SYNCOM) has created a capital pool in excess of $6 million to leverage investment of minority entrepreneurs in broadcast properties. Storer Broadcasting is setting up a minority enterprise small business investment company (MESBIC) capitalized at $5 million, for broadcast acquisitions by minorities.

Most recently, the National Association of Broadcasters started a project to create an even more substantial venture capital pool for this purpose, called the Minority Broadcast Investment Fund. The NAB fund is already subscribed at $8.5 million, and seeks a $15 million goal. The NAB projects that this pool could leverage private financing of many multiples of figure and has set as its goal doubling the number of minority owned broadcast stations within the next three years.

The programs taken together show very substantial promise of providing financing for acquisitions that give minorities control of major market television as well as radio stations. Given this potential, for the FCC to settle for less, and to grant tax certificates for sales where the extent of minority involvement is less than that we are quite certain will assure a long term impact on the diversity of input into programming choices, would only, in the end, frustrate real achievement of the important goals of our tax certificate policy.

[1] *TV-9 Inc.* v. *FCC*, 495 F. 2d 929 (D.C. Cir. 1973) *cert. denied* 418 U.S. 986 (1974).

Separate Statement of Commissioner Joseph R. Fogarty

In Re: Application for Voluntary Transfer of Control of the Licensee of Station KVVU-TV (Channel 5), Henderson, Nevada.

The Commission here properly denies the parties' request for a tax certificate under our *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). The general principle which I believe the Commission enunciates here is that where less than 50 percent minority ownership is proposed, that minority ownership interest must be shown to be a *controlling* interest in order to qualify the assignor or transferor for a tax certificate. In this case the three minority principals would collectively hold only 30 percent of the transferee's stock and thus would clearly be subject to the majority (70 percent) control of the seven non-minority shareholders. Similarly, the minority principals would constitute only a 43 percent minority on the seven-member board of directors. Although the proposed integration of the minority principals at various levels of station management is salutary, the fact remains that they will not *control* the station's operations or programming. Under these circumstances, a grant of a tax certificate would be inconsistent with our *Policy Statement's* intent to promote and facilitate minority ownership *and control* of broadcast facilities. In short, our policy looks to majority or controlling minority ownership, not minority or non-controlling minority ownership.

Separate Statement of Commissioner Tyrone Brown Concurring in the Result

In Re: Nevada Independent Broadcasting Company

I join in the result the Commission has reached in this decision. However, I wish to emphasize that I do not construe *TV-9 Inc v. FCC*[1] either in the present context or in that of a comparative proceeding, as requiring 51 percent ownership interest or "operational control" before this Commission can take special cognizance of minority group involvement in a broadcast licensee. Nor have I concluded that in order for a tax certificate to be issued the minority purchaser must in all circumstances have such operational control. What I have concluded is that, in the case before us, balancing the extent of minority ownership with the extent of proposed operational involvement by the minority principals, issuance of a tax certificate under the minority ownership policy announced last May would not be justified.

[1] 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 11, 1990
Released: October 11, 1990

Martin J. Gaynes, Esq. 8940-AG
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Gaynes:

This is in reference to your request of August 31, 1989, filed on behalf of the general partners of Queen City III Limited Partnership (Queen City III), licensee of station WKBW-TV, Buffalo, New York, for the issuance of a tax certificate, pursuant to Section 1071 of the Internal Revenue Code of 1986 and *Minority Ownership in Broadcasting*, 92 FCC2d 849, 857 (1982).

As background, you note that the general partners for whom a tax certificate is sought were the initial stockholders of Queen City Broadcasting, Inc. (Queen City), a minority-controlled corporation formed in 1985 for the purpose of acquiring WKBW-TV. No minority individual owns as much as 50% of the corporation. On January 2, 1986, Capital Cities Communications, Inc. sold WKBW-TV to Queen City Broadcasting of New York, Inc., a wholly owned subsidiary of Queen City. On June 29, 1989, virtually all of the Queen City shareholders (98%) became general partners in Queen City III by trading their respective shares for cash and general partnership units. Further, as a result of bringing in a new limited partner, who purchased 45% of the equity interest in Queen City III, the equity interests of those stockholders who became general partners were diluted by 45%. Thus, you contend that those stockholders/general partners, including minorities, who provided start-up capital to Queen City should receive a tax certificate for the partial divestiture of their respective interests resulting from this dilution.

In *Minority Ownership in Broadcasting*, above, the Commission stated that "the use of tax certificates as creative financing tools" will provide minorities with significant access to financing, thus promoting the important policy of minority ownership. *Id.* at 857. Accordingly, the Commission extended the availability of tax certificates to initial investors providing start-up capital to minority-owned entities and to investors purchasing interests within the first year of licensing. To be eligible, however, the Commission provided that sale of equity interests must not reduce minority ownership and control in the entity below 51 percent. *Id.* The requirement that at least 51% minority control remain after the transaction prompting the certificates was not meant to preclude "consideration of cases whereby 'minority involvement would have been significant enough' to justify the issuance of a tax certificate in the first instance." *Id.* at n. 39. This latter provision was generally intended to recognize the eligibility of entities in which the minority party was the general partner and a substantial (at least 20%) but not controlling equity investor.

In *R. Clark Wadlow, Esq.*, 4 FCC Rcd 5262 (1989), the minority-controlled entity was controlled by a single person, who owned 80 percent of the voting stock of the entity. We denied his request for a tax certificate based on his providing start-up financing to the entity by his purchase of stock in the entity. We stated that, under the circumstances, no tax certificate should be issued to the controlling minority owner, since after selling his entire interest the entity would no longer be minority controlled and the objectives of the minority ownership policy would be frustrated.

Here, we find the situation and circumstances different. In particular, each investor equally paid full value for the initial interest and no single individual has as much as a controlling interest. More importantly, even though minority ownership has been diluted by 45 percent, the licensee remains under the control of minorities, who hold, in the aggregate, a 55 percent interest. The objective of the Commission's tax certificate policy is to increase the number of minority-owned stations; that is, stations in which the majority of the ownership interest is held by a minority or a group of minorities. Encouraging initial investments by minorities, as well as by others, in entities that are being formed to acquire broadcast media interests as minority-controlled applicants clearly furthers this objective. To hold otherwise would create a disincentive for minorities to come together and invest in an entity that they collectively will control. Accordingly, under the circumstances in this case, we believe that our policy set forth in *Minority Ownership in Broadcasting*, above, should be read to permit the issuance of tax certificates to the initial investors in Queen City.

In view of the foregoing, we find that the Commission's policy of fostering minority ownership will be served and that, therefore, a tax certificate should be issued. The enclosed tax certificate certifies that those identified investors, who acquired stock interests no later than the end of the first year after WKBW-TV's license was issued to Queen City Broadcasting of New York, Inc. are entitled to a tax certificate. This letter was adopted by the Commission on September 21, 1990.

FEDERAL COMMUNIÇATIONS COMMISSION

Donna R. Searcy
Secretary

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1986 INTERNAL REVENUE CODE (26 U.S.C. SECTION 1071)

On January 2, 1986, Capital Cities Communications, Inc. sold WKBW-TV, Buffalo, New York, to Queen City Broadcasting of New York, Inc., a wholly owned subsidiary of Queen City Broadcasting, Inc., an entity controlled by a group of minorities, none of whom held as much as a controlling interest. On June 29, 1989, virtually all of the shareholders (98%) in Queen City Broadcasting, Inc. became general partners in Queen City III Limited Partnership by trading their respective shares for cash and general partnership units. The limited partnership would operate the television station. As a result of bringing in a new limited partner, which purchased 45% of the equity in the limited partnership, the equity interests of those stockholders, who became general partners, were diluted by 45%.

It is hereby certified that those shareholders who acquired stock in Queen City Broadcasting, Inc. provided start-up financing pursuant to the Commission's policy of fostering an increase in minority ownership of broadcast facilities. In that policy statement, the Commission stated that it would issue tax certificates to those initial investors who provide start-up financing, no later than the end of the first year after the station's license was issued or acquired. *See Minority Ownership in Broadcasting,* 92 FCC2d 849, 857 (1982).

This certificate is issued pursuant to the provisions of Section 1071 of the 1986 Internal Revenue Code.

In Witness whereof, I have hereunto set my hand and seal this 11th day of October, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 8, 1989

Released: June 30, 1989

R. Clark Wadlow, Esq.
Schnader, Harrison, Segal & Lewis
1111 19th Street, N.W.
Washington, D.C. 20036

In re:
St. Louis City Communications, Inc.
CSR-3137

Dear Mr. Wadlow:

The Commission, on its own motion, is hereby reconsidering its action of December 29, 1988 (FCC 88-426).[1]

On September 16, 1988, you filed, on behalf of your client, St. Louis City Communications, Inc. (hereinafter "SLCC"), operator of a cable television system serving a portion of St. Louis, Missouri, a petition for special relief. By this petition, SLCC seeks issuance of a tax certificate, pursuant to Section 1071 of the Internal Revenue Code of 1986, as amended, for the sale of SLCC's assets to St. Louis Tele-Communications, Inc., an affiliate of Tele-Communications, Inc. (hereinafter both "TCI"). The instant petition is unopposed.

SLCC states that it is a minority-controlled and operated company: William Johnson, a minority, owns 80 percent of SLCC's stock.[2] SLCC was incorporated on September 7, 1983, and, on May 15, 1984, entered into an agreement with Mr. Johnson and Chase Enterprises (hereinafter "Chase") to obtain $2.5 million in financing to meet closing conditions and to commence construction of the cable system. SLCC reports that it has now negotiated an agreement to sell its assets to TCI for approximately $35 million. SLCC will retire its approximately $9 million in liabilities, and seeks the requested tax certificate to enable the company, "as a continuing minority-controlled enterprise, to retain the net proceeds of the sale of its assets for the purchase of broadcast properties or cable television systems."

SLCC contends that, as start-up investors in a minority entity, both Chase and Mr. Johnson would be eligible for individual tax certificates upon disposition of their interests in SLCC, citing *Policy Statement and Notice of Proposed Rule Making in Gen. Docket No. 82-797*, 92 FCC 2d 849 (1982), and *Policy Statement on Minority Ownership of Cable Television Facilities*, 52 RR 2d 1469 (1982). In this regard, SLCC claims that in *Connection Communications Corporation*, CSR-3037, Mass Media Bur., released April 23, 1987, the Bureau issued tax certificates to all the initial investors in a minority-owned corporation, including the controlling minority shareholder who was selling its interest in the corporation. Accordingly, SLCC asserts, Commission policy would be better served by issuing a tax certificate to SLCC instead, on the gain from the sale of its assets to TCI. Chase and Mr. Johnson would thereby be able to retain their investments and profits in SLCC, and SLCC would reinvest $35 million in cable or broadcast properties controlled by Mr. Johnson. SLCC further notes that its system is surrounded by TCI systems, making TCI the system's only feasible purchaser. SLCC states that both "Chase and Johnson are committed to having SLCC reinvest the proceeds of the sale of the system in controlling interests in operating systems or stations. Thus SLCC . . . will continue as an active and effective owner/operator of cable and/or broadcast properties."

Section 1071 of the 1986 Internal Revenue Code provides:

> If the sale or exchange or property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. . . .

With respect to the sale of interests held by initial investors in a minority controlled entity, the Commission's 1982 policy statement clearly stated: "Generally, to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51%." *Policy Statement and Notice of Proposed Rule Making in Gen. Docket No. 82-797*, 92 FCC 2d at 857. The Commission further explained that "[b]y so requiring remaining 51 percent minority control, we do not mean to preclude consideration of cases whereby 'minority involvement would have been significant enough' to justify the issuance of a tax certificate in the first instance [*e.g.*, limited partnerships]." *Id.* at n. 39. In this case, the controlling minority owner seeks to dispose of his interest in the corporation, and thus the remaining entity would no longer be minority controlled. Under these circumstances, we disagree with SLCC's assertion that Mr. Johnson, the controlling minority shareholder, would be entitled to a tax certificate upon disposition of his 80% controlling interest. In this regard, we note that the facts presented to the Bureau in *Connection Communications Corporation*, did not indicate that the controlling minority owner was selling its interest. It is not apparent that the Bureau would have awarded a tax certificate to the controlling minority shareholder, if it had focused on that fact. Therefore, to the extent that the Bureau's determination in *Connection Communications Corporation* may be interpreted as a departure from our 1982 policy statement, such an interpretation is incorrect. Moreover, it is clear that the Bureau has, in other instances, consistently followed our interpretation of the 1982 *Policy Statement*. *See Ben C. Fisher*, Mass Media Bur., released January 30, 1987 and *Kevin F. Reed*, Mass Media Bur., released January 13, 1986.

It is clear that if the sale of the cable system had been to an entity owned or controlled by a minority, issuance of a tax certificate would be appropriate. *See Minority Ownership of Cable Television Facilities*, *supra*. In this case, though, we are asked to issue a tax certificate for a sale to TCI, a non-minority. This is clearly beyond the parameters of our current tax certificate policy. The question before us is whether it is appropriate nevertheless to issue a tax certificate to SLCC.

We believe that an extension of our tax certificate policy is not warranted in the instant case. The Commission, by its tax certificate policies, seeks to encourage the acquisition of telecommunications properties by members of minority groups. Thus, in your case, the seller of another cable system is encouraged to sell to your client because of the availability of the tax certificate. Further, your client is encouraged to sell to a member of a minority group for the same reason. If the Commission's policy is successful, therefore, two systems would be under minority control. If the departure from Commission policy you propose were adopted, at best only one cable system would be controlled by members of minority groups. Since your proposal would not serve Commission goals as effectively as the existing policy, we perceive no basis for treating minority- and nonminority-controlled entities differently for tax purposes when they sell to nonminorities.

In view of the foregoing, we find that grant of SLCC's petition is not in the public interest. Accordingly, it is ordered that the petition for special relief (CSR-3137), filed September 16, 1988, by St. Louis City Communications, Inc., IS DENIED.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

* Commmissioner Quello dissenting and issuing a statement; Commissioner Dennis issuing a separate statement.

FOOTNOTES

1 This action was reported in a News Release, Mass Media Action Report No. MM-365, Mimeo No. 1098, dated December 30, 1988. No text, order, public notice or certificate was ever released.

2 The remaining 20 percent of SLCC's stock, pursuant to SLCC's franchise, is owned by St. Louis Philanthropic Organization, Inc. SLCC contends that issuance of this stock was not valid. However, as part of the sale to TCI, this 20-percent stock interest will be retired.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: St. Louis City Communications, Inc., CSR-3137

The issue is this case is fairly complex, involving nuances of our investor tax certificate policy that are designed to assist minority ownership in broadcasting and cable. On the specific, indeed unique, facts now before us, I would grant tax certificate to St. Louis City Communications, Inc. (SLCC). In my judgment, the Commission's decision does not promote minority ownership, contravenes our policy of changing tax certificate policies on a prospective basis and is procedurally defective.

Before proceeding with the specific facts in this case it is important to review the policy goals of our minority tax certificate policy. In 1978, the Commission establishes the important objective of promoting minority ownership through the tax certificate policy. *Policy Statement: Minority Ownership of Broadcast Facilities,* 68 F.C.C.2d 979 (1978) *(1978 Minority Policy Statement).* According to that policy, a tax certificate would be granted to a broadcast licensee that transferred its facility to a minority controlled entity. The policy was designed to benefit the minority purchaser by creating an incentive for the seller, through the tax certificate, to sell to a minority.

Because the *1978 Minority Policy Statement* was too restrictive, the Commission expanded the tax certificate thereby encouraging further investment in minority enterprises and facilitating the use of tax certificates as a means of creative financing. *Policy Statement and Notice of Proposed Rulemaking,* Gen. Docket No. 82-797, 92 F.C.C.2d 849 (1982) *(1982 Minority Policy Statement).* One innovation adopted was the investor tax certificate. Investors providing "start up" financing, which allows for acquisition of the property, and investors who purchase shares within the first year after the license is issued, which allows for the stabilization of the capital base, are eligible for an investor tax certificate. *Id.* at 857. So as not to unduly restrict the alienability of their interests, the Commission stated further:

> 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 broadcast stations. (emphasis supplied)

Id. at 858. Concerning additional eligibility requirements for obtaining an investor tax certificate, the 1982 Policy Statement concluded:

> *Generally,* to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51 percent. (emphasis supplied)

Id. at 857. Emphasis should be placed on the word generally, for the Commission stated in a footnote that:

> 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. 5 and 12, *supra).*

Id. at 857 n. 39. The paragraphs referenced by this footnote refer to the Commission's decision to reduce eligibility requirements for limited partnerships from 51 percent to 20 percent. The footnote also references a paragraph discussing the need for a more creative and expansive approach to the administration of tax certificates. *Id.* at 855. Therefore, as drafted, the policy statement does not expressly preclude the type of tax certificate envisioned by SLCC.[1] It is worth noting that the concerns expressed in the *1982 Minority Policy Statement* were not limited to initial acquisition. Rather, the Commission recognized the need to establish a more stable capital base for minority enterprises. Indeed, as with any generalized statement of policy, the key question is whether a particular transaction promotes the goals that underly the policy.

All agree that the pivotal case in this proceeding is the Bureau's decision in *Connection Communications Corp.*, CSR-3038 (M.M. Bur., April 23, 1987). In that case, the Bureau granted a tax certificate to the controlling minority investor pursuant to the investor tax certificate policy. The shareholders in that case were selling their stock back to the corporation which in turn was transferring its assets and cable franchises to a third party. case were selling their stock back to the corporation which in turn was transferring its assets and cable franchises to a third party.

Relying on *Connection*, SLCC requests that the Commission grant it a similar investor tax certificate. The unique aspect of the request, however, is that the tax certificate be given to the *corporation* as opposed to the *individual* investors. Of course, the stock repurchase by the corporation in *Connection* was part of the overall sale to a non-minority third party. Thus, there appears to be little practical difference between granting a tax certificate to a controlling minority shareholder who sells his stock back to a corporation as part of an overall transfer to a third party and giving the certificate to the corporation itself. Drawing such a distinction elevates form over substance. Accordingly, I believe the teachings of *Connection* apply to the instant case. In any event, pursuant to the precedent established in *Connection*, William Johnson and Chase Enterprises, as individuals would be eligible for a tax certificate.[2]

I would grant the tax certificate to SLCC for two fundamental reasons. First. based on the rather unique circumstances of the case, I believe that minority ownership in cable television would be facilitated. Second, even assuming the majority's position regarding the *Connection case*, our policy regarding prospective changes in our tax certificate policy as well as the procedural errors in this case compel a grant.

On the facts before us, St. Louis City Communications is located in an area that is essentially surrounded by cable systems owned and operated by Tele-Communications, Inc. (TCI). Given the pattern of acquisitions in the cable industry, TCI appears to be the only logical purchaser of the system. Moreover, petitioner states the sale to TCI would settle pending litigation. In my opinion, the pending litigation regarding ownership of the system makes this case unique because the litigation affects the station's alienability. Together, these factors make the sale to an individual minority cable operator unlikely. TCI is the only realistic purchaser of the system. It does not appear that there is a viable minority purchaser for the system, a situation not likely to be replicated in other markets.

Confronted with this situation, the issue is what policy would best promote minority ownership. In the instant case, SLCC, as a corporate entity, proposes to reinvest the proceeds of the sale and acquire a *controlling* interest in another broadcast or cable facility. Such a commitment is not required by our existing tax certificate policy, which merely requires that a seller reinvest in communications properties to be eligible for a tax deferral. These investments may be passive, however, with the minority investor no longer in a controlling position. Because a condition would be placed on the certificate itself, SLCC will ultimately be in control of facilities presumably reaching larger audiences, thereby fostering the diversity goals of our minority ownership policy.

A fundamental objective of the *1982 Minority Policy Statement* was to promote "stabilization of the entity's capital base." *1982 Minority Policy Statement*, 92 F.C.C.2d at 857. Granting a tax certificate to the corporation in this case is consistent with this objective because it allows the original investors to preserve a pool of minority controlled capital. Moreover, giving the certificate to SLCC, provides a strong incentive for the noncontrolling, nonminority investor, Chase Enterprises, to remain involved in the investment.[3] In some respects, the facts before us are more compelling than cases granting certificates to individual investors, who then take the proceeds and invest in non-minority controlled media interests.

The majority disapprove the tax certificate stating that it should be given only if SLCC transferred its cable system to another minority controlled entity. They assert that if the Commission's policy is successful, two systems would be under minority control. Of course precisely the opposite occurred in this case. Given the unique facts of this case, minority purchasers were unlikely, at best. Because of the condition placed on the certificate, granting the tax certificate would guarantee the American public a larger, more significant minority controlled broadcast or cable outlet. The majority's approach gives no assurance that Mr. Johnson or Chase Enterprises will continue to invest in media facilities that are minority controlled. Thus, instead of having two minority controlled outlets, we have none. It is ironic that in the name of promoting minority ownership the Commission has adopted a policy that, at least in the context of this case, may result in a net decrease in the number of minority controlled media facilities.[4]

There is a second, independent justification for granting the tax certificate in this case. The majority now hold that the Bureau's decision in *Connection* no longer controls. Of course, the Commission is not bound by a Bureau decision. In the area of tax certificates, however, the Commission has generally followed a policy of making changes limiting application of the policy prospectively. For example, when the Commission changed its policy regarding the grant of partial tax certificates, it changed the rule prospectively. *See Policy Statement on the Issuance of Tax Certificates*, 52 R.R.2d 757, 758 (1982). This makes eminent sense. Tax considerations are an important part of media transactions. Undue hardship results if the Commission changes its tax certificate policy without fair warning. Indeed, the *1982 Minority Ownership policy* statement recognized this fact and created a procedure where parties could request declaratory rulings in order to reduce such uncertainty. *See 1982 Minority Ownership Policy*, 92 F.C.C.2d at 858 (1982).

If the Commission wishes to overrule the Connection case, then it should do so prospectively. In *Connection*, an investor tax certificate was granted to the controlling minority shareholder upon the sale of his shares. To now hold that the Bureau was unaware of the facts before it, thereby limiting the case's precedential value, is unfair in the context of our tax certificate policy.[5] It is reasonable to assume that Bureau or Commission decisions are made with full knowledge of the facts. Based on *Connection*, the

Bureau expanded the application of the investor tax certificate policy. It is worth noting that the Bureau decisions cited by the majority predate the *Connection* case and are premised on the *1978 Minority Ownership Policy and* not the investor tax certificate policy established in 1982.

Finally, I must disagree with the procedural course this case has taken. Consistent with the recommendations expressed in the *1982 Minority policy Statement*, SLCC sought a ruling from the Commission. The Commission decided to grant the tax certificate and a press release was issued. I recognize generally, press releases do not constitute official Commission action. *See Microwave Communications, Inc. v. FCC*, 514 F.2d 385 (D.C. Cir. June 27, 1974). However, unlike the *MCI* case, the issue is not merely computing time for the purpose of filing a timely appeal. Also, we are not confronted with a situations where the case turns on a difference in language between a press release and an official Commission decision. A certificate was granted. At the time of the grant, there was no opposition to the tax certificate. The only remaining action to be taken by the Commission was the ministerial act of releasing its decision and the certificate. I believe it was reasonable for SLC to rely on the Commission's grant as reported in its press release. Unfortunately, by changing its mind the majority has denied the opportunity to structure its transaction with TCI to minimize its tax consequences. Such a result hurts our minority ownership objectives by unnecessarily reducing the pool of minority controlled capital that is available for subsequent investment. Because the grant of a tax certificate would promote minority ownership in this case, the Commission should stand by its decision.

It appears we have placed the petitioners in an impossible situation. First, Section 1.108 of our rules states that: "The Commission may, on its own motion, set aside any action taken by it within 30 days from the date of *public notice* of such action." Obviously 30 days have passed since the date the Commission first approved the tax certificate. According to the majority, however, the thirty-day time period does not commence until the public notice is issued. The rule refers to § 1.4(b) for the definition of public notice, which states that public notice occurs upon the release date of the *full text of the document*. 47 C.F.R. § 1.4(h)(2). Under this interpretation, the Commission could keep the thirty-day time period from running by simply not releasing the document. The majority's construction of § 1.108 would keep parties in administrative limbo for years.[6] Under this scenario, interested parties have no idea what is being reconsidered because they have no chance to review a released document. A more appropriate reading of § 1.108 would be that public notice is a condition precedent to *sua sponte* review by the Commission. Such an approach provides interested parties with an opportunity to examine the initial decision and perhaps comment on it. Under this interpretation, the majority would be precluded from engaging in a *sua sponte* reconsideration until it released a decision. This construction is more consistent with the goals of administrative fairness.

In summary, I believe minority ownership would be enhanced by granting a tax certificate in the instant case. We have done a great disservice to SLCC. Under the majority's approach, we have no assurance that the parties in this case will invest in media entities that are minority controlled. In a broader sense, we have also hurt existing minority owners by creating a disincentive for minorities to invest in their own facilities. Accordingly, I dissent.

FOOTNOTES FOR STATEMENT

[1] The Commission has extended the investor tax certificate policy to cable television. *Policy Statement on Minority Ownership of Cable Television Facilities*, 52 R.R.2d 1469, 1472 n.16 (1982).

[2] There are two principals involved. William Johnson is the controlling minority shareholder who originally owned 80% of the stock in the corporation. The remaining 20% is allegedly owned by the St. Louis Philanthropic Organization Inc. This ownership interest is disputed by SLCC and is the subject of pending litigation. To secure adequate financing, Johnson has transferred 50% of his interest to Chase Enterprises. Chase also retains an option to purchase Johnson's remaining shares.

[3] The policy position taken by the majority creates an unfair investment climate for minority entrepreneurs. Non-minority investors are allowed to contribute "start up" capital, sell their investment to anyone and obtain an investor tax certificate. Minority entrepreneurs who invest in themselves and hold controlling interests are unable to enjoy similar tax benefits. Moreover, with the demise of the General Utilities Doctrine, the remaining controlling minority shareholder is taxed at two levels, corporate and individual, upon the sale of the cable system. Such an approach is simply bad policy, providing a disincentive for minorities to invest in their own enterprises.

[4] Because of the unique facts of this case, I need not address the broader policy issue concerning whether the Commission should *routinely* grant tax certificates to incumbent minority owners when they sell their properties to non-minorities. However, I shall discuss it because the majority appear to reach this issue. The primary concern appears to be that such a policy would create an incentive for minorities to "sell out," thereby reducing the number of minority owners. First, there is no indication that such a policy would have a negative impact on entry level minority ownership. Based on an informal survey of cases, there have been approximately 183 minority tax certificates granted since 1978. Approximately 7 (3.8%) of these transactions involved minority to minority transfers. Thus, an overwhelming majority (96%) of minority broadcasters acquired their facilities from non-minority entities. Obviously, granting tax certificates to incumbent minority controlled entities upon the sale of their facilities would not diminish the incentives for non-minorities to use the tax certificate policy to sell to minorities. Second, requiring minority owners to reinvest in *controlling* interests ensures that there would be no decline in minority ownership. On the contrary, they would be in a position to reach larger audiences. On balance, such a policy would not impair minority ownership in broadcasting and cable.

[5] The simple unfairness of the decision is exacerbated because the minority's decision not only denies a tax certificate to SLCC but appears to prevent Mr. William Johnson, as an individual, from receiving an investor tax certificate. If SLCC had known in advance of the Bureau's incorrect assessment of the facts in *Connection*, it would have had the opportunity to either restructure its corporate form or its arrangement with TCI.

[6] This is not a case where the filing of a petition for reconsideration tolls the time period for *sua sponte* reconsideration by the Commission. *See Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978). Although the Commission has received correspondence in this case, none appears to constitute a petition for reconsideration as defined in our rules.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: St. Louis City Communications, Inc., CSR-3137

I write separately to explain why I changed my vote and now oppose SLCC's request for a tax certificate. This does not imply any lack of support for the tax certificate policy. On the contrary, I strongly support it. Minorities own fewer than three percent of all broadcast stations, and an even smaller percentage of cable systems. The tax certificate addresses this severe underrepresentation by giving sellers an economic incentive to seek out minority buyers. Since the policy was adopted in 1978, we have issued 183 tax certificates (178 for broadcast stations and five for cable systems) and the number of minority-owned stations has gradually increased.

I originally voted to issue a tax certificate to SLCC because I thought extending the policy to "tradeups" would further promote minority ownership. Giving SLCC a tax certificate upon the sale of its St. Louis system would have placed more money in SLCC's hands, and would have permitted a minority-owned company to upgrade its holdings more quickly. It would serve the public interest if more minority-owned companies acquired major-market TV stations and cable systems, instead of being largely relegated to marginal AM stations.

Nevertheless, I have decided to vote against this request. Extending our tax certificate policy as SLCC proposes might help a few minority-owned companies but, on balance, it would not contribute to the goals of the Commission's minority ownership policy. I have reached this conclusion for four reasons. First, granting SLCC a tax certificate does not further the primary objective of the tax certificate policy: to increase diversity by encouraging sales to minority buyers. If SLCC could obtain a tax certificate whether or not it sells to a minority-owned company, SLCC would have no incentive to seek out minority buyers. In fact, a grant would create a perverse incentive for minority owners to trade in stations simply to secure the benefit of the tax certificate. Extending our seller tax certificate policy to include non-minority buyers is a step in the wrong direction.

Second, I think the primary goal of our minority ownership policy has been and should continue to be to promote new entry. The biggest hurdle to minority ownership is securing the financing to buy a first property. Once a minority-owned company has operated a station and developed a track record, it will face fewer problems in raising money to buy a second or third station. Of course, the seller tax certificate is not purely a "new entry" policy. We currently grant tax certificates whenever a minority-owned company acquires a broadcast system or cable system, regardless of the number of stations or systems the company already owns. Nevertheless, I do not believe the seller tax certificate policy should be so supple as to cover the sale of a minority-owned facility to a non-minority.

Third, even absent a grant, SLCC and others similarly situated still benefit from our tax certificate policy. SLCC told the Commission that it plans to use the proceeds from the St. Louis sale to buy another media property. That acquisition will qualify for a tax certificate, which will assist SLCC in finding a property and negotiating a favorable price. (The tax certificate, of course, will be awarded to the seller, but as a practical matter, the buyer and the seller share the benefit of a tax certificate. The premise of our tax certificate policy is that giving a tax certificate to sellers will materially assist minority buyers.)

Finally, as a legal matter this decision follows established Commission policy. Although the 1982 policy statement is not a model of clarity, it appears that the "investor" tax certificate policy SLCC cites was designed to apply only if the station or cable system would continue under minority ownership following the investor's withdrawal. *Policy Statement and Notice of Proposed Rulemaking in Gen. Docket No. 82-797*, 92 FCC 2d 849, 857-58 (1982). For example, if a controlling minority stockholder buys back shares from a MESBIC or another original investor, that transaction would be covered by the investor tax certificate.

Under SLCC's interpretation, we would be obliged to grant a tax certificate whenever a minority-controlled company sells a station, as long as the company is controlled by its original investors at the time of sale. The *Policy Statement*, however, appears to preclude grant of an investor tax certificate to a company such as SLCC:

> Generally, to be eligible for a tax certificate such transactions must not reduce minority ownership of and control in the entity below 51 percent.

Policy Statement at 857 [footnote omitted]. *See also Policy Statement* at 858, n. 40. In this case, the "transaction" is sale of the cable company from SLCC to TCI; the "entity" is the cable company which will no longer be owned and controlled by minorities. Therefore, it appears that SLCC is not entitled to receive a tax certificate.

The case law interpreting the investor tax certificate is meager. The decision cites the three relevant cases-- *Kevin F. Reed*, Mass. Med. Bur., released January 13, 1988; *Ben C. Fisher*, Mass Med. Bur., released January 30, 1987; and *Connection Communications Corporation*, CSR-3037, Mass Media Bur., released April 23, 1987. The first two cases flatly denied requests for tax certificates in circumstances similar to SLCC's. In *Kevin F. Reed*, for example, the minority owner "wishe[d] to upgrade his broadcast holdings by selling his station to a nonminority person and investing the proceeds in a station that has a potentially larger audience." Nevertheless, the Bureau found "no basis for treating minority- and non-minority-controlled licensees differently for tax purposes when they sell to nonminorities."

In *Connection*, the Bureau granted an investor tax certificate to shareholders of Connection Communications Corporation, a black-owned cable company, when the shareholders sold their stock back to the company. The Bureau noted that the shareholders had provided start-up financing to Connection. In that case, the "transaction" covered by the tax certificate was not sale of assets to a non-minority company, but sale of stock back to the minority-owned corporation. To be analogous to case, Connection would have had to be selling to a non-minority and itself seeking a tax certificate. These were not the facts in *Connection*.

All three "cases" were actually unpublished letters issued by the Mass Media Bureau. None of these decisions is necessarily binding on the Commission. Under the circumstances in this case we should pursue the primary goal of our tax certificate policy: to encourage entry by minority companies. Granting a tax certificate to SLCC would not promote that goal and therefore, I must vote to deny the certificate.[1]

FOOTNOTE FOR STATEMENT

[1] I am acutely aware that my change of vote has reversed the outcome. We originally announced in a press release that by a 2-1 vote, we would grant the tax certificate. Instead, the Commission has now decided 2-1 to deny it. I deeply regret any injury the parties may have suffered in relying on the original press release. However, as we note in the heading of every Commission press release: "This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. *See MCI v. FCC,* 515 F. 2d 385 (D.C. Cir. 1975)." Accordingly, we cannot grant relief based on detrimental reliance on our press release and still preserve the integrity of the policy that only Commission orders constitute official action.

Calendar No. 34

104TH CONGRESS *1st Session*	SENATE	REPORT 104–16

PERMANENT EXTENSION OF DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS

MARCH 20 (legislative day, MARCH 16), 1995.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 831]

[Including cost estimate of the Congressional Budget Office]

The Committee on Finance, to which was referred the bill (H.R. 831) to amend the Internal Revenue Code of 1986 to permanently extend the deduction for the health insurance costs of self-employed individuals, to repeal the provision permitting nonrecognition of gain on sales and exchanges effectuating policies of the Federal Communications Commission, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

99–010

The amendment to the bill is as follows:

SECTION 1. PERMANENT EXTENSION AND INCREASE OF DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS.

(a) PERMANENT EXTENSION.—Subsection (l) of section 162 of the Internal Revenue Code of 1986 (relating to special rules for health insurance costs of self-employed individuals) is amended by striking paragraph (6).

(b) INCREASE IN DEDUCTION.—Paragraph (1) of section 162(l) of the Internal Revenue Code of 1986 is amended by striking "25 percent" and inserting "30 percent".

(c) EFFECTIVE DATES.—

(1) EXTENSION.—The amendment made by subsection (a) shall apply to taxable years beginning after December 31, 1993.

(2) INCREASE.—The amendment made by subsection (b) shall apply to taxable years beginning after December 31, 1994.

SEC. 2. REPEAL OF NONRECOGNITION ON FCC CERTIFIED SALES AND EXCHANGES.

(a) IN GENERAL.—Subchapter O of chapter 1 of the Internal Revenue Code of 1986 is amended by striking part V (relating to changes to effectuate FCC policy).

(b) CONFORMING AMENDMENTS.—Sections 1245(b)(5) and 1250(d)(5) of the Internal Revenue Code of 1986 are each amended—

(1) by striking "section 1071 (relating to gain from sale or exchange to effectuate polices of FCC) or", and

(2) by striking "1071 AND" in the heading thereof.

(c) CLERICAL AMENDMENT.—The table of parts for such subchapter O is amended by striking the item relating to part V.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to—

(A) sales and exchanges on or after January 17, 1995, and

(B) sales and exchanges before such date if the FCC tax certificate with respect to such sale or exchange is issued on or after such date.

(2) BINDING CONTRACTS.—

(A) IN GENERAL.—The amendments made by this section shall not apply to any sale or exchange pursuant to a written contract which was binding on January 16, 1995, and at all times thereafter before the sale or exchange, if the FCC tax certificate with respect to such sale or exchange was applied for, or issued, on or before such date.

(B) SALES CONTINGENT ON ISSUANCE OF CERTIFICATE.—A contract shall be treated as not binding for purposes of subparagraph (A) if the sale or exchange pursuant to such contract, or the material terms of such contract, were contingent, at any time on January 16, 1995, on the issuance of an FCC tax certificate. The preceding sentence shall not apply if the FCC tax certificate for such sale or exchange is issued on or before January 16, 1995.

(3) FCC TAX CERTIFICATE.—For purposes of this subsection, the term "FCC tax certificate" means any certificate of the Federal Communications Commission for the effectuation of section 1071 of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of this Act).

SEC. 3. SPECIAL RULES RELATING TO INVOLUNTARY CONVERSIONS.

(a) REPLACEMENT PROPERTY ACQUIRED BY CORPORATIONS FROM RELATED PERSONS.—

(1) IN GENERAL.—Section 1033 of the Internal Revenue Code of 1986 (relating to involuntary conversions) is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

"(i) NONRECOGNITION NOT TO APPLY IF CORPORATION ACQUIRES REPLACEMENT PROPERTY FROM RELATED PERSON.—

"(1) IN GENERAL.—In the case of a C corporation, subsection (a) shall not apply if the replacement property or stock is acquired from a related person. The preceding sentence shall not apply to the extent that the related person acquired the replacement property or stock from an unrelated person during the period described in subsection (a)(2)(B).

"(2) RELATED PERSON.—For purposes of this subsection, a person is related to another person if the person bears a relationship to the other person described in section 267(b) or 707(b)(1)."

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to involuntary conversions occurring on or after February 6, 1995.

(b) APPLICATION OF SECTION 1033 TO CERTAIN SALES REQUIRED FOR MICROWAVE RELOCATION.—

(1) IN GENERAL.—Section 1033 of the Internal Revenue Code of 1986 (relating to involuntary conversions), as amended by subsection (a), is amended by redesignating subsection (j) as subsection (k) and by inserting after subsection (i) the following new subsection:

"(j) SALES OR EXCHANGES TO IMPLEMENT MICROWAVE RELOCATION POLICY.—

"(1) IN GENERAL.—For purposes of this subtitle, if a taxpayer elects the application of this subsection to a qualified sale or exchange, such sale or exchange shall be treated as an involuntary conversion to which this section applies.

"(2) QUALIFIED SALE OR EXCHANGE.—For purposes of paragraph (1), the term 'qualified sale or exchange' means a sale or exchange before January 1, 2000, which is certified by the Federal Communications Commission as having been made by a taxpayer in connection with the relocation of the taxpayer from the 1850–1990MHz spectrum by reason of the Federal Communications Commission's reallocation of that spectrum for use for personal communications services. The Commission shall transmit copies of certifications under this paragraph to the Secretary."

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to sales or exchanges after March 14, 1995.

SEC. 4. DENIAL OF EARNED INCOME CREDIT FOR INDIVIDUALS HAVING MORE THAN $2,450 OF INVESTMENT INCOME.

(a) IN GENERAL.—Section 32 of the Internal Revenue Code of 1986 is amended by redesignating subsections (i) and (j) as subsections (j) and (k), respectively, and by inserting after subsection (h) the following new subsection:

"(i) DENIAL OF CREDIT FOR INDIVIDUALS HAVING MORE THAN $2,450 OF INVESTMENT INCOME.—

"(1) IN GENERAL.—No credit shall be allowed under subsection (a) for the taxable year if the aggregate amount of disqualified income of the taxpayer for the taxable year exceeds $2,450.

"(2) DISQUALIFIED INCOME.—For purposes of paragraph (1), the term 'disqualified income' means—

"(A) interest which is received or accrued during the taxable year (whether or not exempt from tax),

"(B) dividends to the extent includible in gross income for the taxable year, and

"(C) the excess (if any) of—

"(i) gross income from rents or royalties not derived in the ordinary course of a trade or business, over

"(ii) the sum of—

"(I) expenses (other than interest) which are clearly and directly allocable to such gross income, plus

"(II) interest expenses properly allocable to such gross income."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1995.

SEC. 5. REVISION OF TAX RULES ON EXPATRIATION.

(a) IN GENERAL.—Subpart A of part II of subchapter N of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 877 the following new section:

"SEC. 877A. TAX RESPONSIBILITIES OF EXPATRIATION.

"(a) GENERAL RULE.—For purposes of this subtitle, if any United States citizen relinquishes his citizenship during a taxable year—

"(1) except as provided in subsection (f)(2), all property held by such citizen at the time immediately before such relinquishment shall be treated as sold at such time for its fair market value, and

"(2) notwithstanding any other provision of this title, any gain or loss shall be taken into account for such taxable year.

Paragraph (2) shall not apply to amounts excluded from gross income under part III of subchapter B.

"(b) EXCLUSION FOR CERTAIN GAIN.—The amount which would (but for this subsection) be includible in the gross income of any individual by reason of subsection (a) shall be reduced (but not below zero) by $600,000.

"(c) PROPERTY TREATED AS HELD.—For purposes of this section, except as otherwise provided by the Secretary, an individual shall be treated as holding—

"(1) all property which would be includible in his gross estate under chapter 11 were such individual to die at the time the property is treated as sold,

"(2) any other interest in a trust which the individual is treated as holding under the rules of subsection (f)(1), and

"(3) any other interest in property specified by the Secretary as necessary or appropriate to carry out the purposes of this section.

"(d) EXCEPTIONS.—The following property shall not be treated as sold for purposes of this section:

"(1) UNITED STATES REAL PROPERTY INTERESTS.—Any United States real property interest (as defined in section 897(c)(1)), other than stock of a United States real property holding corporation which does not, on the date the individual relinquishes his citizenship, meet the requirements of section 897(c)(2).

"(2) INTEREST IN CERTAIN RETIREMENT PLANS.—

"(A) IN GENERAL.—Any interest in a qualified retirement plan (as defined in section 4974(c)), other than any interest attributable to contributions which are in excess of any limitation or which violate any condition for taxfavored treatment.

"(B) FOREIGN PENSION PLANS.—

"(i) IN GENERAL.—Under regulations prescribed by the Secretary, interests in foreign pension plans or similar retirement arrangements or programs.

"(ii) LIMITATION.—The value of property which is treated as not sold by reason of this subparagraph shall not exceed $500,000.

"(e) RELINQUISHMENT OF CITIZENSHIP.—For purposes of this section, a citizen shall be treated as relinquishing his United States citizenship on the earliest of—

"(1) the date the individual renounces his United States nationality before a diplomatic or consular officer of the United States pursuant to paragraph (5) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(5)),

"(2) the date the individual furnishes to the United States Department of State a signed statement of voluntary relinquishment of United States nationality confirming the performance of an act of expatriation specified in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(1)-(4)),

"(3) the date the United States Department of State issues to the individual a certificate of loss of nationality, or

"(4) the date a court of the United States cancels a naturalized citizen's certificate of naturalization.

Paragraph (1) or (2) shall not apply to any individual unless the renunciation or voluntary relinquishment is subsequently approved by the issuance to the individual of a certificate of loss of nationality by the United States Department of State.

"(f) SPECIAL RULES APPLICABLE TO BENEFICIARIES' INTERESTS IN TRUST.—

"(1) DETERMINATION OF BENEFICIARIES' INTEREST IN TRUST.—For purposes of this section—

"(A) GENERAL RULE.—A beneficiary's interest in a trust shall be based upon all relevant facts and circumstances, including the terms of the trust instrument and any letter of wishes or similar document, historical patterns of trust distributions, and the existence of and functions performed by a trust protector or any similar advisor.

"(B) SPECIAL RULE.—In the case of beneficiaries whose interests in a trust cannot be determined under subparagraph (A)—

"(i) the beneficiary having the closest degree of kinship to the grantor shall be treated as holding the remaining interests in the trust not determined under subparagraph (A) to be held by any other beneficiary, and

"(ii) if 2 or more beneficiaries have the same degree of kinship to the grantor, such remaining interests shall be treated as held equally by such beneficiaries.

"(C) CONSTRUCTIVE OWNERSHIP.—If a beneficiary of a trust is a corporation, partnership, trust, or estate, the shareholders, partners, or beneficiaries shall be deemed to be the trust beneficiaries for purposes of this section.

"(D) TAXPAYER RETURN POSITION.—A taxpayer shall clearly indicate on its income tax return—

"(i) the methodology used to determine that taxpayer's trust interest under this section, and

"(ii) if the taxpayer knows (or has reason to know) that any other beneficiary of such trust is using a different methodology to determine such beneficiary's trust interest under this section.

"(2) DEEMED SALE IN CASE OF TRUST INTEREST.—If an individual who relinquishes his citizenship during the taxable year is treated under paragraph (1) as holding an interest in a trust for purposes of this section—

"(A) the individual shall not be treated as having sold such interest,

"(B) such interest shall be treated as a separate share in the trust, and

"(C)(i) such separate share shall be treated as a separate trust consisting of the assets allocable to such share,

"(ii) the separate trust shall be treated as having sold its assets immediately before the relinquishment for their fair market value and as having distributed all of its assets to the individual as of such time, and

"(iii) the individual shall be treated as having recontributed the assets to the separate trust.

Subsection (a)(2) shall apply to any income, gain, or loss of the individual arising from a distribution described in subparagraph (B)(ii).

"(g) TERMINATION OF DEFERRALS, ETC.—On the date any property held by an individual is treated as sold under subsection (a), notwithstanding any other provision of this title—

"(1) any period during which recognition of income or gain is deferred shall terminate, and

"(2) any extension of time for payment of tax shall cease to apply and the unpaid portion of such tax shall be due and payable at the time and in the manner prescribed by the Secretary.

"(h) RULES RELATING TO PAYMENT OF TAX.—

"(1) IMPOSITION OF TENTATIVE TAX.—

"(A) IN GENERAL.—If an individual is required to include any amount in gross income under subsection (a) for any taxable year, there is hereby imposed, immediately before the individual relinquishes United States citizenship, a tax in an amount equal to the amount of tax which would be imposed if the taxable year were a short taxable year ending on the date of such relinquishment.

"(B) DUE DATE.—The due date for any tax imposed by subparagraph (A) shall be the 90th day after the date the individual relinquishes United States citizenship.

"(C) TREATMENT OF TAX.—Any tax paid under subparagraph (A) shall be treated as a payment of the tax imposed by this chapter for the taxable year to which subsection (a) applies.

"(2) DEFERRAL OF TAX.—The provisions of section 6161 shall apply to the portion of any tax attributable to amounts included in gross income under subsection (a) in the same manner as if such portion were a tax imposed by chapter 11.

"(i) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations providing appropriate adjustments to basis to reflect gain recognized by reason of subsection (a) and the exclusion provided by subsection (b).

"(j) CROSS REFERENCE.—

"For termination of United States citizenship for tax purposes, see section 7701(a)(47)."

(b) DEFINITION OF TERMINATION OF UNITED STATES CITIZENSHIP.—Section 7701(a) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

"(47) TERMINATION OF UNITED STATES CITIZENSHIP.—An individual shall not cease to be treated as a United States citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(e)."

(c) CONFORMING AMENDMENT.—Section 877 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(f) APPLICATION.—This section shall not apply to any individual who relinquishes (within the meaning of section 877A(e)) United States citizenship on and after February 6, 1995."

(d) CLERICAL AMENDMENT.—The table of sections for subpart A of part II of subchapter N of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after the item relating to section 877 the following new item:

"Sec. 877A. Tax responsibilities of expatriation."

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to United States citizens who relinquish (within the meaning of section 877A(e) of the In-

ternal Revenue Code of 1986, as added by this section) United States citizenship on or after February 6, 1995.

(2) DUE DATE FOR TENTATIVE TAX.—The due date under section 877A(h)(1)(B) of such Code shall in no event occur before the 90th day after the date of the enactment of this Act.

I. LEGISLATIVE BACKGROUND

H.R. 831 was passed by the House of Representatives on F
ruary 21, 1995, by a vote of 381 to 44. As passed by the Hous
Representatives, H.R. 831 would: (1) extend permanently the
percent deduction for health insurance costs of self-employed i
viduals; (2) repeal the provision (Code section 1071) permit
nonrecognition of gain on sales and exchanges effectuating poli
of the Federal Communications Commission ("FCC"); (3) pro
that the nonrecognition of gain on involuntary conversions is
to apply if replacement property is acquired from a related pe
(Code section 1033); and (4) deny the earned income tax cr
("EITC") to individuals who have more than $3,150 of taxable
terest and dividend income and phase out the EITC for individ
with more than $2,500 of taxable interest and dividend income.
On March 7, 1995, the Committee on Finance held a public h
ing on the application of Internal Revenue Code section 1071 u
the FCC's tax certificate program. On February 8, 1995, the C
mittee on Finance held a public hearing on the revenue provis
in the President's fiscal year 1996 budget proposal, which incl
provisions relating to the EITC and tax treatment of U.S. citi
who relinquish their citizenship.
On March 15, 1995, the Committee on Finance held a ma
of H.R. 831, and ordered the bill to be reported with modificat
(a committee amendment in the nature of a substitute for H.R.
as passed by the House).

II. SUMMARY

As reported by the Committee on Finance, H.R. 831 would:
(1) Provide a 25-percent deduction for health insurance expe
of self-employed individuals for taxable years beginning in 1
and a 30-percent deduction for taxable years beginning in 1995
thereafter.
(2) Repeal Code section 1071, generally effective for sales o
changes on or after January 17, 1995, and sales or exchange
fore that date if the FCC tax certificate with respect to the sa
exchange is issued on or after that date.
(3) Modify Code section 1033 to provide that, in the case of
corporation, deferral of gain is not available when replace
property or stock is purchased from a related party. This prov
is effective with respect to involuntary conversions occurring
after February 6, 1995. Also, provide that sales or exchanges
are certified by the FCC as made by a taxpayer in connection
a microwave relocation from the 1850–1990MHz spectrum by
son of the FCC's reallocation of that spectrum for use for per

[1] For a description of H.R. 831 as reported by the House Committee on Ways and Mea
H. Rept. No. 104-32, 104th Cong., 1st Sess. (1995).

communications services ("PCS") would be treated as an involuntary conversion to which section 1033 applies. This provision applies to sales or exchanges occurring before January 1, 2000.

(4) Deny the earned income tax credit to taxpayers if the aggregate amount of interest income (whether or not exempt from tax), dividend income, net rental income and royalties exceeds $2,450, effective for taxable years beginning after December 31, 1995.

(5) Provide that U.S. citizens who relinquish their citizenship are required to recognize, and pay income tax on, unrealized and deferred gains with respect to property held immediately prior to the expatriation. This provision is effective for U.S. citizens who relinquish citizenship on or after February 6, 1995. Provided that the revenues raised from the provision to tax gains on property held by U.S. citizens who relinquish their citizenship will be reserved for deficit reduction, and will not be used to offset the tax relief provisions of the bill or any subsequent legislation.

III. EXPLANATION OF PROVISIONS

A. PERMANENTLY EXTEND AND INCREASE DEDUCTION FOR HEALTH INSURANCE COSTS OF SELF-EMPLOYED INDIVIDUALS (SEC. 1 OF THE BILL AND SEC. 162(L) OF THE CODE)

Present Law

Under present law, the tax treatment of health insurance expenses depends on whether the taxpayer is an employee and whether the taxpayer is covered under a health plan paid for by the employee's employer. An employer's contribution to a plan providing accident or health coverage for the employee and the employee's spouse and dependents is excludable from an employee's income. The exclusion is generally available in the case of owners of a business who are also employees.

In the case of self-employed individuals (i.e., sole proprietors or partners in a partnership) no equivalent exclusion applies. However, prior law provided a deduction for 25 percent of the amount paid for health insurance for a self-employed individual and the individual's spouse and dependents. The 25-percent deduction was available with respect to the cost of a self-insured plan as well as commercial insurance. However, in the case of self-insurance, the deduction was not available unless the self-insured plan was in fact insurance (e.g., there is appropriate risk shifting) and not merely a reimbursement arrangement. The 25-percent deduction was not available for any month if the taxpayer was eligible to participate in a subsidized health plan maintained by the employer of the taxpayer or the taxpayer's spouse. In addition, no deduction was available to the extent that the deduction exceeded the taxpayer's earned income. The amount of expenses paid for health insurance in excess of the deductible amount could be taken into account in determining whether the individual was entitled to an itemized deduction for medical expenses. The 25-percent deduction expired for taxable years beginning after December 31, 1993.

For purposes of these rules, more than 2-percent shareholders of S corporations are treated the same as self-employed individuals. Thus, they were entitled to the 25-percent deduction.

Other individuals who purchase their own health insurance (e., someone whose employer does not provide health insurance) c. deduct their insurance premiums only to the extent that the pı miums, when combined with other unreimbursed medical expens exceed 7.5 percent of adjusted gross income.

Reasons for Change

The 25-percent deduction for health insurance costs of self-e ployed individuals was added by the Tax Reform Act of 1986 to ı duce the disparity between the tax treatment of owners of inc porated and unincorporated businesses. The provision was enact on a temporary basis, and has been extended several times sir enactment.

The Committee believes it is appropriate to continue to redı the disparity between the tax treatment of health insurance penses of owners of incorporated and unincorporated business Further, the Committee believes that the pattern of allowing t deduction to expire and then extending it creates unneeded unc tainty for taxpayers. Thus, the Committee believes the deducti should be made permanent.

In addition, because the Committee believes that self-emplo individuals should be entitled to a deduction for their health ins ance expenses in the same manner as owners of incorporated bu nesses, the Committee finds it appropriate to increase the level the deduction from 25 to 30 percent, beginning in 1995.

Explanation of Provision

The bill retroactively reinstates for 1994 the deduction for percent of health insurance costs of self-employed individuals a extends the deduction permanently. For years beginning after I cember 31, 1994, the deduction is increased to 30 percent.

Effective Date

The provision is generally effective for taxable years beginn after December 31, 1993. The increase in the deduction to 30 p cent of health insurance costs is effective for taxable years beg ning after December 31, 1994.

B. REPEAL SPECIAL RULES APPLICABLE TO FCC-CERTIFIED SALES BROADCAST PROPERTIES (SEC. 2 OF THE BILL AND SEC. 1071 OF T CODE)

Present Law and Background

Tax treatment of a seller of broadcast property

General tax rules

Under generally applicable Code provisions, the seller of a bı ness, including a broadcast business, recognizes gain to the ext the sale price (and any other consideration received) exceeds seller's basis in the property. The recognized gain is then subj to the current income tax unless the gain is deferred or not re nized under a special tax provision.

Special rules under Code section 1031

Under Code section 1031, no gain or loss is recognized if property held for productive use in a trade or business or for investment is exchanged for property of a "like kind" that is to be held for productive use in a trade or business or for investment. The nonrecognition rules do not apply to an exchange of one class or kind of property for property of a different class or kind.[2] The different classes of property are: (1) depreciable tangible personal property; (2) intangible personal property; and (3) real property.[3] Corporate stock or partnership interests do not qualify as like-kind replacement property.

If an exchange consists not only of like-kind property, but also of other property or money, then gain from the transaction is recognized to the extent of the money and the fair market value of the other property, and no loss from the transaction may be recognized. The basis of property received in a like-kind transaction generally is the same as the basis of any property exchanged, decreased by the amount of money received or loss recognized on the exchange and increased by the amount of gain recognized on the exchange. Special rules apply to exchanges between related persons, which generally require the parties to the transaction to hold the exchanged property for at least two years after the exchange.

Special rules under Code section 1033

Under Code section 1033, gain realized by a taxpayer from certain involuntary conversions of property is deferred to the extent the taxpayer purchases property similar or related in service or use to the converted property. The replacement property may be acquired directly or by acquiring control of a corporation (generally, 80 percent of the stock of the corporation) that owns replacement property. The taxpayer's basis in the replacement property generally is the same as the taxpayer's basis in the converted property, decreased by the amount of any money or loss recognized on the conversion, and increased by the amount of any gain recognized on the conversion.

Only involuntary conversions that result from destruction, theft, seizure, or condemnation (or threat or imminence thereof) are eligible for deferral under Code section 1033. In addition, the term "condemnation" refers to the process by which private property is taken for public use without the consent of the property owner but upon the award and payment of just compensation, according to a ruling by the Internal Revenue Service (IRS).[4] Thus, for example, an order by a Federal court to a corporation to divest itself of ownership of certain stock because of anti-trust rules is not a condemnation (or a threat or imminence thereof), and the divestiture is not eligible for deferral under this provision.[5] Under another IRS ruling, the "threat or imminence of condemnation" test is satisfied if, prior to the execution of a binding contract to sell the property, "the property owner is informed, either orally or in writing by a representative of a governmental body or public official authorized

[2] Treas. Reg. sec. 1.1031(a)-1(b).
[3] Treas. Reg. sec. 1.1031(a)-2.
[4] Rev. Rul. 58-11, 1958-1 C.B. 273.
[5] Id.

to acquire property for public use, that such body or official ha cided to acquire his property, and from the information conv to him has reasonable grounds to believe that his property wi condemned if a voluntary sale is not arranged."[6] However, u this ruling, the threatened taking also must constitute a demnation, as defined above.

Special rules under Code section 1071

Under Code section 1071, if the FCC certifies that a sale o change of property is necessary or appropriate to effectua change in a policy of, or the adoption of a new policy by, the with respect to the ownership and control of "radio broadca stations," a taxpayer may elect to treat the sale or exchange involuntary conversion. The FCC is not required to determin tax consequences of certifying a sale or to consult with the about the certification process.[7] No other provision of the Int Revenue Code grants a Federal agency or any other party the of complete discretion conveyed to the FCC by Code section

Under Code section 1071, the replacement requirement i case of FCC-certified sales may be satisfied by purchasing st a corporation that owns broadcasting property, whether or n stock represents control of the corporation. In addition, even taxpayer does not reinvest all the sales proceeds in similar or ed replacement property, the taxpayer nonetheless may el defer recognition of gain if the basis of depreciable property is owned by the taxpayer immediately after the sale or that quired during the same taxable year is reduced by the amou deferred gain.

Tax treatment of a buyer of broadcast property

Under generally applicable Code provisions, the purchase broadcast business, or any other business, acquires a basis to the purchase price paid. In an asset acquisition, a buyer allocate the purchase price among the purchased assets to mine the buyer's basis in these assets. In a stock acquisitio buyer generally takes a basis in the stock equal to the pu price paid, and the business retains its basis in the assets. treatment applies whether or not the seller of the broadcast erty has received an FCC certificate exempting the sale trans from the normal tax treatment.

FCC tax certificate program

Multiple ownership policy

The FCC originally adopted multiple ownership rules in the 1940s.[8] These rules prohibited broadcast station owners from ing more than one station in the same service area, and, gen more than six high frequency (radio) or three television st Owners wishing to acquire additional stations had to divest

[6] Rev. Rul. 74-8, 1974-1 C.B. 200.
[7] The FCC allows sellers applying for FCC certificates in cable transactions to delete sales price and the number of subscribers from the transaction documents submitted request for the certificates.
[8] 6 Fed. Reg. 2382 (June 26, 1940) (multiple ownership rules for high frequency broad tions); 6 Fed. Reg. 2284 (May 6, 1941) (multiple ownership rules for television stations).

selves of stations they already owned in order to remain in compliance with the FCC's rules.

In November 1943, the FCC adopted a rule that prohibited duopolies (ownership of more than one station in the same city).[9] After these rules were adopted, owners wishing to acquire additional stations in excess of the national ownership limit had to divest themselves of stations they already owned in order to remain in compliance with the FCC's rules. After Code section 1071 was adopted in 1943, in some cases, parties petitioned the FCC for tax certificates pursuant to Code section 1071 when divesting themselves of stations. These divestitures were labeled "voluntary divestitures" by the FCC. When the duopoly rule was adopted, 35 licensees that held more than one license in a particular city were required by the rule "involuntarily" to divest themselves of one of the licenses.[10]

Minority ownership policy

In 1978, the FCC announced a policy of promoting minority ownership of broadcast facilities by offering an FCC tax certificate to those who voluntarily sell such facilities (either in the form of assets or stock) to minority individuals or minority-controlled entities.[11] The FCC's policy was based on the view that minority ownership of broadcast stations would provide a significant means of fostering the inclusion of minority views in programming, thereby serving the needs and interests of the minority community as well as enriching and educating the non-minority audience. The FCC subsequently expanded its policy to include the sale of cable television systems to minorities as well.[12]

"Minorities," within the meaning of the FCC's policy, include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders."[13] As a general rule, a minority-controlled corporation is one in which more than 50 percent of the voting stock is held by minorities. A minority-controlled limited partnership is one in which the general partner is a minority or minority-controlled, and minorities have at least a 20-percent interest in the partnership.[14] The FCC requires those who acquire broadcast properties with the help of the FCC tax certificate policy to hold those properties for at least one year.[15] An acquisition can qualify even if there is a pre-existing agreement (or option) to buy out the minority interests at the end of the one-year holding period, providing that the transaction is at arm's-length.

In 1982, the FCC further expanded its tax certificate policy for minority ownership. At that time, the FCC decided that, in addition to those who sell properties to minorities, investors who contribute to the stabilization of the capital base of a minority enter-

[9] 8 Fed. Reg. 16065 (Nov. 23, 1943).
[10] FCC Announces New Policy Relating to Issuance of Tax Certificates, 14 FCC2d 827 (1956).
[11] Minority Ownership of Broadcasting Facilities, 68 FCC2d 979 (1978).
[12] Minority Ownership of Cable Television Systems, 52 R.R.2d 1469 (1982).
[13] 52 R.R.2d at n. 1.
[14] Commission's Policy Regarding the Advancement of Minority Ownership in Broadcasting, Policy Statement, and Notice of Proposed Rulemaking, 92 FCC2d 853–855 (1982).
[15] See Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), 57 R.R.2d 1149 (1985). Anti-trafficking rules require cable properties to be held for at least three years (unless the property is sold pursuant to a tax certificate).

prise would be entitled to a tax certificate upon the subsequent
of their interest in the minority entity.[16] To qualify for an FCC
certificate in this circumstance, an investor must either (1) pro
start-up financing that allows a minority to acquire either br
cast or cable properties, or (2) purchase shares in a minority-
trolled entity within the first year after the license necessary to
erate the property is issued to the minority. An investor can qu
for a tax certificate even if the sale of the interest occurs after
ticipation by a minority in the entity has ceased. In these si
tions, the status of the divesting investor and the purchaser of
divested interest is irrelevant, because the goal is to increase
financing opportunities available to minorities.

Personal communications services ownership policy

In 1993, Congress provided for the orderly transfer of
quencies, including frequencies that can be licensed pursuan
competitive bidding procedures.[17] The FCC has adopted rule
conduct auctions for the award of more than 2,000 licenses to
vide personal communications services ("PCS"). PCS will be
vided by means of a new generation of communication devices
will include small, lightweight, multi-function portable ph
portable facsimile and other imaging devices, new types of m
channel cordless phones, and advanced paging devices with
way data capabilities. The PCS auctions (which began last
will constitute the largest auction of public assets in American
tory and are expected to generate billions of dollars for the U
States Treasury.[18]

The FCC has designed procedures to ensure that small
nesses, rural telephone companies and businesses owned by w
and minorities have "the opportunity to participate in the
sion" of PCS, as Congress directed in 1993.[19] To help mino
and women participate in the auction of the PCS licenses, the
took several steps including up to a 25-percent bidding credit,
duced upfront payment requirement, a flexible installment
ment schedule, and an extension of the tax certificate progra
businesses owned by minorities and women.[20]

The FCC will employ the tax certificate program in three
(1) initial investors (who provide "start-up" financing or pur
interests within the first year after license issuance) in mi
and woman-owned PCS businesses will be eligible for FCC ta
tificates upon the sale of their investments; (2) holders of P
censes will be able to obtain FCC tax certificates upon the s
the business to a company controlled by minorities and wome
(3) a cellular operator that sells its interest in an overlappin
lular system to a minority or a woman-owned business to com
compliance with the FCC PCS/cellular cross-ownership rule v
eligible for a tax certificate. In addition, as discussed belo
FCC will issue tax certificates for PCS to encourage fixed

[16] Commission Policy Regarding the Advancement of Minority Ownership in Broadca
FCC2d 849 (1982).
[17] Omnibus Budget Reconciliation Act of 1993, P.L. 103–66, Title VI.
[18] Fifth Report and Order, 9 FCC Rcd 5532 (1994).
[19] Omnibus Budget Reconciliation Act of 1993, P.L. 103–66, section 6002(a).
[20] Installment payments are available to small businesses and rural telephone compa

wave operators voluntarily to relocate to clear a portion of the spectrum for PCS technologies.

Microwave relocation policy

PCS can operate only on frequencies below 3GHz. However, because that frequency range is currently occupied by various private fixed microwave communications systems (such as railroads, oil pipelines, and electric utilities), there are no large blocks of unallocated spectrum available to PCS. To accommodate PCS, the FCC has reallocated the spectrum; the 1850–1990MHz spectrum will be used for PCS, and the microwave systems will be required to move to higher frequencies. Current occupants of the 1850–1990MHz spectrum allocated to PCS must relocate to higher frequencies not later than three years after the close of the bidding process.[21] In accordance with FCC rules, these current occupants have the right to be compensated for the cost of replacing their old equipment, which can operate only on the 1850–1990MHz spectrum, with equipment that will operate at the new, higher frequency. At a minimum, the winners of the new PCS licenses must pay for and install new facilities to enable the incumbent microwave operators to relocate. The amount of these payments and characteristics of the new equipment will be the subject of negotiation between the incumbent microwave operators and the PCS licensees; thus, the nature of the compensation (i.e., solely replacement equipment, or a combination of replacement equipment plus a cash payment) is unknown at present. If no agreement is reached within the 3-year voluntary negotiation period, the microwave operators will be required by the FCC to vacate the spectrum; however, the timing of such relocation is uncertain because the relocation would take place only after completion of a formal negotiation process in which the FCC would be a participant.

The FCC will employ the tax certificate program for PCS to encourage fixed microwave operators voluntarily to relocate from the 1850–1990MHz band to clear the band for PCS technologies.[22] Tax certificates will be available to incumbent microwave operators that relocate voluntarily within three years following the close of the bidding process. Thus, the certificates are intended to encourage such occupants to relocate more quickly than they otherwise would and to clarify the tax treatment of such transactions.[23]

Congressional appropriations rider

Since fiscal year 1988, in appropriations legislation, the Congress has prohibited the FCC from using any of its appropriated funds to repeal, to retroactively apply changes in, or to continue a reexamination of its comparative licensing, distress sale and tax certificate policies.[24] This limitation has not prevented an expansion of

---

[21] The PCS auctions for the 1850–1990MHz spectrum commenced in December, 1994.

[22] See, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

[23] The transaction between the PCS licensee and the incumbent microwave operator might qualify for tax-free treatment as a like kind exchange under Code section 1031 or as an involuntary conversion under Code section 1033. However, the availability of deferral under these Code provisions may be uncertain in certain circumstances. For example, it may be unclear whether the transaction would qualify as an involuntary conversion under currently applicable IRS standards.

[24] Pub. L. No. 100–202 (1987).

the existing program.[25] The current rider will expire at the en the 1995 fiscal year, September 30, 1995.

Reasons for Change

The Committee, in its review of the administration and oper of Code section 1071, found serious tax policy problems with provision. As an initial matter, the standards pursuant to w the FCC will issue tax certificates have evolved far beyond Congress originally contemplated. Congress originally inte Code section 1071 to alleviate the burden of taxpayers who been forced to sell their radio stations under difficult wartime cumstances. The FCC has interpreted the provision to permit FCC to grant unlimited tax benefits for routine and voluntary of a wide range of communication properties.

In addition, the FCC's standards for issuing tax certificates been so vague that the program appears to have been subje significant abuse. For example, the FCC's definition of "control purposes of its minority ownership policies provides little gua tee that a minority will effectively manage a broadcast pro after the sale of property has been certified. In addition, bec the FCC generally requires only one year of minority ownersh control to qualify for a tax certificate, section 1071 has frequ resulted in only transitory minority ownership of broadcast erties, i.e., in many cases the granting of the tax certificate ha resulted in achieving the objective of minority ownership or co

Further, the FCC's interpretation and administration of the certificate program has not been supervised or subject to any tematic review by the IRS, or any other government body could evaluate the tax cost of the program. In granting tax ce cates, the FCC does not take into account or request any info tion regarding the size of the potential tax benefit involved. FCC also does not request any showing or representation that amount of the tax benefits, which at least initially accrue to non-minority seller generally, is in any way reflected in the of a lower purchase price to the minority-owned or controlled chaser. As a result, it is possible that, in many cases, the e tax benefit accrues to the non-minority seller.

From a tax policy perspective, the Committee found serious ciencies in section 1071. No other provision of the Internal Rev Code conveys the level of discretion to a Federal government a cy comparable to the discretion conveyed on the FCC by se 1071. Thus, section 1071 grants the authority to the FCC to ad ister what is, in effect, an open-ended entitlement program wi constraints imposed to limit the extent to which the FCC ma lize the provision.

As a result of these considerations, the Committee concluded the tax cost of the FCC tax certificate program far outweighs demonstrated benefit of the program. The Committee also cluded that the section is inconsistent with sound tax policy. Committee therefore is repealing the provision.

---

[25] The appropriations restriction "does not prohibit the agency from taking steps to greater opportunity for minority ownership." H. Rept. No. 103–708 (Conf. Rept.), 103d C Sess. 40 (1994).

Explanation of Provision

The bill repeals Code section 1071. Thus, a sale or exchange of broadcast properties would be subject to the same tax rules applicable to all other taxpayers engaged in the sale or exchange of a business.

Effective Date

The repeal of section 1071 is effective for (1) sales or exchanges on or after January 17, 1995,[26] and (2) sales or exchanges before that date if the FCC tax certificate with respect to the sale or exchange is issued on or after that date. The provision does not apply to taxpayers who have entered into a binding written contract (or have completed a sale or exchange pursuant to a binding written contract) before January 17, 1995, and who have applied for an FCC tax certificate by that date. A contract is treated as not binding for this purpose if the sale or exchange pursuant to the contract (or the material terms of the contract) were contingent on January 16, 1995, on issuance of an FCC tax certificate. A sale or exchange would not be contingent on January 16, 1995, on issuance of an FCC tax certificate if the tax certificate had been issued by the FCC by that date.

C. PROHIBIT NONRECOGNITION OF GAIN ON INVOLUNTARY CONVERSIONS IN CERTAIN RELATED-PARTY TRANSACTIONS; APPLICATION OF SECTION 1033 TO CERTAIN MICROWAVE RELOCATION TRANSACTIONS (SEC. 3 OF THE BILL AND SEC. 1033 OF THE CODE)

Present Law

As described above (Part III.B.), under Code section 1033, gain realized by a taxpayer from certain involuntary conversions of property is deferred to the extent the taxpayer purchases property similar or related in service or use to the converted property within a specified period.

Under rulings issued by the IRS to taxpayers, property (stock or assets) purchased from a related person may, in some cases, qualify as property similar or related in service or use to the converted property.[27] Thus, in certain circumstances, related taxpayers may obtain significant (and possibly indefinite or permanent) tax deferral without any additional cash outlay to acquire new properties. In cases in which a taxpayer purchases stock as replacement property, section 1033 permits the taxpayer to reduce basis of stock, but does not require any reduction in the basis of the underlying assets. Thus, the reduction in basis of stock does not result in reduced depreciation deductions.

[26] On January 17, 1996, House Committee on Ways and Means Chairman Archer issued a press release announcing that the Committee on Ways and Means would immediately review the operation of section 1071 to explore possible legislative changes to section 1071, including the possibility of repeal. The press release stated that any changes to section 1071 may apply to transactions completed, or certificates issued by the FCC, on or after the date of the announcement.

[27] See, e.g., PLR 8132072, PLR 8020069. Private letter rulings do not have precedential authority and may not be relied upon by any taxpayer other than the taxpayer receiving the ruling but are some indication of IRS administrative practice.

Reasons for Change

In the course of its deliberations, the Committee also becam aware of problems with the operation of Code section 1033. Und interpretations issued by the IRS, taxpayers are able to purcha replacement property from a related party, thereby avoiding th need to buy "new" replacement property and, sometimes, effectivel resulting in a total tax forgiveness for the transaction. The Com mittee intends that, in the future, corporate taxpayers be require to buy replacement property only from unrelated persons in ord to receive the special tax treatment under section 1033.

In addition, the Committee sought to ensure tax-free treatme for transactions between PCS licensees and the incumbent micr wave operators in connection with the relocation of the microwa operators from the 1850–1990MHz spectrum by reason of th FCC's reallocation of that spectrum for use for PCS. (See descri tion of present law, Part III.B.) Thus, the Committee intends th such transactions constitute involuntary conversions under Cod section 1033. However, no inference is intended with respect to th nature or appropriate tax treatment of any other transactions.

Explanation of Provision

Related-party transactions

Under the bill, subchapter C corporations are not entitled defer gain under Code section 1033 if the replacement property stock is purchased from a related person. A person is treated as r lated to another person if the person bears a relationship to th other person described in Code section 267(b) or 707(b)(1). An e ception to the general rule provides that a taxpayer could purcha replacement property or stock from a related person and defer ga under Code section 1033 to the extent the related person acquire the replacement property or stock from an unrelated person withi the period prescribed under Code section 1033. Thus, property a quired from outside the group within the period prescribed by se tion 1033 and retransferred to the taxpayer member of the grou within the prescribed time period, will qualify in the hands of th taxpayer to the extent that the property's basis or other net ta consequences to the group do not change as a result of the transfe

Microwave relocation transactions

The bill provides that sales or exchanges that are certified by th FCC as having been made by a taxpayer in connection with the r location of the taxpayer from the 1850–1990MHz spectrum by re son of the FCC's reallocation of that spectrum for use for PC would be treated as involuntary conversions to which Code sectio 1033 applies.

Effective Date

The provision prohibiting the purchase of qualified replacemen property from a related party applies to involuntary conversions o curring on or after February 6, 1995.

The provision treating certain microwave relocation transactions as involuntary conversions applies to sales or exchanges occurring before January 1, 2000.

D. DENY EARNED INCOME TAX CREDIT FOR TAXPAYERS WITH MORE THAN $2,450 OF INVESTMENT INCOME (SEC. 4 OF THE BILL AND SEC. 32 OF THE CODE)

Present Law

Eligible low-income workers are able to claim a refundable earned income tax credit (EITC). The amount of the credit an eligible taxpayer may claim depends upon whether the taxpayer has one, more than one, or no qualifying children and is determined by multiplying the credit rate by the taxpayer's earned income up to an earned income threshold. The maximum amount of the credit is the product of the credit rate and the earned income threshold. For taxpayers with earned income (or adjusted gross income, if greater) in excess of the phaseout threshold, the credit amount is reduced by the phaseout rate multiplied by the amount of earned income (or adjusted gross income, if greater) in excess of the phaseout threshold. The credit is not allowed if earned income (or adjusted gross income, if greater) exceeds the phaseout limit. There is no additional limitation on the amount of unearned income that the taxpayer may receive.

The parameters for the EITC depend upon the number of qualifying children the taxpayer claims. For 1995 the parameters are as follows:

	Two or more qualifying children—	One qualifying child—	No qualifying children—
Credit rate (in percent)	36.00	34.00	7.65
Phaseout rate (in percent)	20.22	15.98	7.65
Earned income threshold	$8,640	$6,160	$4,100
Maximum credit	$3,110	$2,094	$314
Phaseout threshold	$11,290	$11,290	$5,130
Phaseout limit	$26,673	$24,396	$9,230

The earned income threshold and the phaseout threshold are indexed for inflation; because the phaseout limit depends on those amounts, the phaseout rate, and the credit rate, the phaseout limit will also increase if there is inflation. Earned income consists of wages, salaries, other employee compensation, and net self-employment income.

The credit rates and phaseout rates for the EITC change over time under present law. For 1996 and after, the credit rate will be 40.00 percent and the phaseout rate will be 21.06 percent for taxpayers with two or more qualifying children. The credit rate and the phaseout rate for taxpayers with one qualifying child or no qualifying children will be the same as those listed in the table above.

To claim the EITC, a taxpayer must either have a qualifying child or must meet other requirements. A qualifying child must meet a relationship test, an age test, and a residence test. In order to claim the EITC without a qualifying child, a taxpayer must not be a dependent and must be over age 24 and under age 65.

Reasons for Change

Under present law, a taxpayer may have relatively low earn income, and therefore may be eligible for the EITC, despite al having significant unearned income. The Committee believes th the EITC should be targeted to families with the greatest nee Therefore, the Committee believes that it is inappropriate to all an EITC to taxpayers with significant unearned income.

Explanation of Provision

Under the bill, a taxpayer is not eligible for the EITC if the a gregate amount of disqualified income of the taxpayer for the ta able year exceeds $2,450. Disqualified income is the sum of:

(1) interest (whether or not subject to tax) received or a crued in the taxable year,

(2) dividends to the extent includible in gross income for t taxable year, and

(3) net income (if greater than zero) from rents and royalti not derived in the ordinary course of business.

Disqualified income would not include interest accrued during t taxable year on a United States savings bond issued at discou under 31 U.S.C. 3105 for which a cash-basis taxpayer has not ma the election under Code section 454(a) to treat such accrued inte est as received in the taxable year.

Effective Date

The provision is effective for taxable years beginning after D cember 31, 1995.

E. IMPOSE TAX ON U.S. CITIZENS WHO RELINQUISH CITIZENSHIP (SE 5 OF THE BILL AND SEC. 877A OF THE CODE)

Present Law

U.S. citizens and residents generally are subject to U.S. incon taxation on their worldwide income (sec. 61 of the Code and Trea Reg. sec. 1-1.1(b)). The U.S. tax may be reduced or offset by a cre it allowed for foreign income taxes paid with respect to foreign i come (secs. 901-907). Nonresident aliens are taxed at a flat rate 30 percent (or a lower treaty rate) on certain types of passive i come derived from U.S. sources, and at regular graduated rates o net profits derived from a U.S. business (sec. 871).

The United States imposes tax on gains recognized by foreig persons that are attributable to dispositions of interests in U. real property (secs. 897, 1445, 6039C, and 6652(f), known as t Foreign Investment in Real Property Tax Act ("FIRPTA")).[28] Suc

[28] Under the FIRPTA provisions, tax is imposed on gains from the disposition of an inter (other than an interest solely as a creditor) in real property (including an interest in a mi well, or other natural deposit) located in the United States or the U.S. Virgin Islands. Also i cluded in the definition of a U.S. real property interest is any interest (other than an inter solely as a creditor) in any domestic corporation unless the taxpayer establishes that the c poration was not a U.S. real property holding corporation (USRPHC) at any time during t five year period ending on the date of the disposition of the interest (sec. 897(c)(1)(A)(ii)) USRPHC is any corporation, the fair market value of whose U.S. real property interests equ or exceeds 50 percent of the sum of the fair market values of (i) its U.S. real property interest

Continu

gains generally are subject to tax at the same rates that apply to similar income received by U.S. persons. The Code imposes a withholding obligation when a U.S. real property interest is acquired from a foreign person (sec. 1445). The amount required to be withheld on the sale by a foreign investor of a U.S. real property interest is generally 10 percent of the amount realized (gross sales price) (sec. 1445(a)). However, the amount withheld generally will not exceed the transferor's maximum tax liability if a certificate for reduced withholding is issued by the Internal Revenue Service (IRS) (sec. 1445(c)(1)).

Distributions, including lump-sum distributions, that foreign persons receive from qualified U.S. retirement plans generally are subject to U.S. tax at a 30-percent rate. However, to the extent these distributions represent contributions with respect to services performed in the United States after 1986, the distributions are subject to U.S. tax at graduated rates. The U.S. tax is frequently reduced or eliminated under applicable U.S. income tax treaties.

A U.S. citizen who relinquishes U.S. citizenship with a principal purpose to avoid Federal tax may be subjected to an alternative taxing method for 10 years after expatriation (sec. 877). A special rule applies with respect to the burden of proving the existence or nonexistence of U.S. tax avoidance as one of the principal purposes of the expatriation. Under this provision, the Treasury Department may establish that it is reasonable to believe that the expatriate's loss of U.S. citizenship would, but for the application of this provision, result in a substantial reduction in the U.S. tax based on the expatriate's probable income for the taxable year (sec. 877(e)) . If this reasonable belief is established, then the expatriate must carry the burden of proving that the loss of citizenship did not have as one of its principal purposes the avoidance of U.S. income, estate or gift taxes.

Under this alternative method, the expatriate generally is taxed on his U.S. source income (net of certain deductions), as well as on certain business profits, at rates applicable to U.S. citizens and residents. Solely for this purpose, gains on the sale of property located in the United States and stocks and securities issued by U.S. persons also are treated as U.S. source income (sec. 877(c)). The alternative method applies only if it results in a higher U.S. tax liability than the amount otherwise determined for nonresident aliens.

The United States imposes its estate tax on the worldwide estates of persons who were citizens or domiciliaries of the United States at the time of death (secs. 2001, 2031), and on certain property belonging to nondomiciliaries of the United States which is located in the United States at the time of their death (secs. 2101, 2103). The U.S. gift tax is imposed on all gifts made by U.S. citizens and domiciliaries, and on gifts of property made by nondomiciliaries where the property is located in the United States at the time of the gift (sec. 2501).

(ii) its interests in foreign real property, plus (iii) any other of its assets which are used or held for use in a trade or business (sec. 897(c)(2)).

Reasons for Change

The Committee has been informed that a small number of ve wealthy individuals each year relinquish their U.S. citizenship f the purpose of avoiding U.S. income, estate, and gift taxes. By doing, such individuals reduce their annual U.S. income tax liab ity and eliminate their eventual U.S. estate tax liability.

The Committee recognizes that citizens of the United States ha a basic right not only to physically leave the United States to li elsewhere, but also to relinquish their U.S. citizenship. The Coı mittee does not believe that the Internal Revenue Code should used to stop U.S. citizens from expatriating; however, the Comm tee also does not believe that the Code should provide a tax ince tive for expatriating.

The Committee is concerned that present law, which bases t application of the alternative method of taxation under section 8 on proof of a tax-avoidance purpose, has proven difficult to admi ister. In addition, the Committee is concerned that the alternati method can be avoided by postponing the realization of U.S. sour income for 10 years. The Committee believes that section 877 largely ineffective to tax U.S. citizens who expatriate with a pri cipal purpose to avoid tax.

The Committee believes that the alternative tax system of se tion 877 should be replaced by a tax regime that applies to expat ates who remove large amounts of appreciated assets out of U. tax jurisdiction, but does not rely on establishing a tax-avoidan motive. Inasmuch as U.S. citizens who retain their citizenship a subject to income tax on accrued appreciation when they dispose their assets, as well as estate tax on the full value of assets th are held until death, the Committee believes it fair and equitab to tax expatriates on the appreciation of their assets when they r linquish their U.S. citizenship. The Committee is informed, ho ever, that most U.S. citizens who relinquish their U.S. citizensh do not avoid large amounts of U.S. tax by so doing. Therefore, t Committee believes that an expatriation tax should not apply to e patriates who remove only modest amounts of appreciated asse out of U.S. tax jurisdiction.

The Committee approved the provision in order to reduce t Federal budget deficit. The Committee does not intend that t revenue raised from this provision be used to offset the tax-reli provisions of the bill or of any subsequent legislation.

Explanation of Provision

In general

Under the bill, a U.S. citizen who relinquishes citizenship ge erally is treated as having sold all of his property at fair mark value immediately prior to the expatriation. Gain or loss from th deemed sale is recognized at that time, generally without regard other provisions of the Code.[29]

[29] See the discussion of the application of the Code's income exclusions under "Other speci rules" below

Net gain on the deemed sale is recognized under the bill only to the extent it exceeds $600,000 ($1.2 million in the case of married individuals filing a joint return, both of whom expatriate).

Property taken into account

Property treated as sold by an expatriating citizen under the provision includes all items that would be included in the individual's gross estate under the Federal estate tax if such individual were to die on the day of the deemed sale, plus certain trust interests that are not otherwise includible in the gross estate (discussed below under "Interests in trusts"), and other interests that may be specified by the Treasury Department in order to carry out the purposes of the provision.

The bill provides that certain types of property, although includable in the gross estate were the expatriate to die while subject to U.S. estate tax, are not taken into account for purposes of determining the expatriation tax. U.S. real property interests, which remain subject to U.S. taxing jurisdiction in the hands of nonresident aliens, generally are not taken into account.[30] Also not taken into account are interests in qualified retirement plans, other than interests attributable to excess contributions or contributions that violate any condition for tax-favored treatment. In addition, under regulations, interests in foreign pension plans and similar retirement plans or programs are not taken into account up to a maximum amount of $500,000.

Interests in trusts

Under the bill, an expatriate who is a beneficiary of a trust is deemed to own a separate trust consisting of the assets allocable to his share of the trust, in accordance with his interest in the trust (discussed below). The separate trust is treated as selling its assets for fair market value immediately before the beneficiary relinquishes his citizenship, and distributing all resulting income and corpus to the beneficiary. The beneficiary is treated as subsequently recontributing the assets to the trust. Consequently, the separate trust's basis in the assets will be stepped up and all assets held by the separate trust will be treated as corpus.

The bill provides that a beneficiary's interest in a trust is determined on the basis of all facts and circumstances. These include the terms of the trust instrument itself, any letter of wishes or similar document, historical patterns of trust distributions, the role of any trust protector or similar advisor, and anything else of relevance. The Committee expects that the Treasury Department will issue regulations to provide guidance as to the determination of trust interests for purposes of the expatriation tax. The Committee intends that such regulations disregard de minimis interests in trusts, such as an interest of less than a certain percentage of the trust as determined on an actuarial basis, or a contingent remainder interest that has less than a certain likelihood of occurrence.

In the event that any beneficiaries' interests in the trust cannot be determined on the basis of the facts and circumstances, the ben-

[30] The exception would apply to all U.S. real property interests, as defined in section 897(c)(1), except the stock of a U.S. real property holding corporation that does not satisfy the require-

eficiary with the closest degree of family relationship to the settl would be presumed to hold the remaining interests in the trus The beneficiaries would be required to disclose on their respecti tax returns the methodology used to determine that beneficiary interest in the trust, and whether that beneficiary knows (or h reason to know) that any other beneficiary of the trust uses a di ferent method.

The Committee intends that the special rule for interests in trust not apply to a grantor trust. The bill follows the grantor tru rules in treating a grantor of a grantor trust as the owner of th trust assets for tax purposes. Therefore, a grantor who expatriat is treated as directly selling the assets held by the trust for pu poses of computing the tax on expatriation. Similarly, a beneficia of a grantor trust who is not treated as an owner of a portion the trust under the grantor trust rules is not considered to hold a interest in the trust for purposes of the expatriation tax.

Date of relinquishment of citizenship

Under the bill, a U.S. citizen who renounces his U.S. nationalit before a diplomatic or consular officer of the United States pursu ant to section 349(a)(5) of the Immigration and Nationality Act (U.S.C. section 1481(a)(5)) is treated as having relinquished his cit zenship on that date, provided that the renunciation is later co firmed by the issuance of a certificate of loss of nationality by th U.S. Department of State. A U.S. citizen who furnishes to the Stat Department a signed statement of voluntary relinquishment U.S. nationality confirming the performance of an expatriating a specified in section 349(a)(1)–(4) of the Immigration and Nationa ity Act (8 U.S.C. section 1481(a)(1)–(4)) is treated as having reli quished his citizenship on the date such statement is so furnishe provided that the voluntary relinquishment is later confirmed b the issuance of a certificate of loss of nationality by the U.S. D partment of State. Any other U.S. citizen to whom the Departmen of State issues a certificate of loss of nationality is treated as ha ing relinquished his citizenship on the date that such certificate i issued to the individual. A naturalized citizen is treated as havin relinquished his citizenship on the date a court of the Unite States cancels his certificate of naturalization. If any individual i described in more than one of the above categories, the individu is treated as having relinquished his citizenship on the earliest the applicable dates.

The Committee anticipates that an individual who has either r nounced his citizenship or furnished a signed statement of vo untary relinquishment but has not received a certificate of loss nationality from the Department of State by the date on which h is required to file a tax return covering the year of expatriation wi file his U.S. tax return as if he expatriated. The Committee furthe anticipates that such an individual will amend his return for the year in the event that the Department of State fails to confirm th expatriation by issuing a certificate of loss of nationality.

Administrative requirements

Under the bill, an individual who is subject to the tax on exp tax that would have been due based on a hypothetical short tax year that ended on the date the individual relinquished his citizenship.[31] The tentative tax is due on the 90th day after the date of relinquishment. The Committee expects that Treasury regulations (under the authority of sec. 6011) will require that the expatriate file a tax return at such time. The individual also is required to file a full-year tax return for the tax year during which he expatriated reporting all of his taxable income for the year, including gain attributable to the deemed sale of assets on the date of expatriation. The individual's U.S. Federal income tax liability for such year will be reduced by the tentative tax paid with the filing of the hypothetical short-year return.

The bill provides that the time for the payment of the tax on expatriation may be extended for a period not to exceed 10 years at the request of the taxpayer, as provided by section 6161. The Committee expects that a taxpayer's interest in non-liquid assets such as an interest in a closely-held business interest (as defined in sec. 6166(b)) will be taken into account in determining reasonable cause for the extension of time to pay the tax on expatriation.

In the event that the expatriating individual and the Treasury Department agree to defer payment of the tax on expatriation for a period that extends beyond the filing date for the full-year tax return for the year of expatriation, the bill provides that the individual would not be required to pay a tentative tax. The entire gain on the deemed sale of property on the date of expatriation would be included in the individual's full-year tax return for that year, and would be paid in accordance with the provisions of the deferred-tax agreement under section 6161. The Committee expects that the Treasury Department will not agree to defer payment of the tax on expatriation unless the taxpayer provides adequate assurance that all amounts due under the agreement will be paid.

The Committee expects that the Department of State will notify the IRS of the name and taxpayer identification number of any U.S. citizen who relinquishes U.S. citizenship promptly after the date of relinquishment, as defined in the provision.[32] In addition, the Committee anticipates that the Department of State will request of any expatriating citizen, at the time of relinquishment of citizenship, appropriate information to assist the IRS in enforcing the requirements of the provision.

Other special rules

As noted above, the tax on expatriation applies generally notwithstanding other provisions of the Code. For example, gain that would be eligible for nonrecognition treatment if the property were actually sold is treated as recognized for purposes of the tax on expatriation. In addition, for example, bona fide residence in a U.S. possession or commonwealth does not affect the application of the

[31] Thus, the tentative tax is based on all the income, gain, deductions, loss and credits of the individual for the year through the date of relinquishment, including amounts realized from the deemed sale of property. The tentative tax is treated as imposed immediately before the individual relinquishes citizenship.

[32] That is, without waiting for the issuance of a certificate of loss of nationality.

expatriation tax.[33] However, the bill provides that the portions o the gain treated as realized under the provisions of the expatria tion tax are not recognized to the extent they are treated as ex cluded under the specific income exclusions of sections 101–13 (Subtitle A, Chapter 1B, Part III) of the Code.

Other special rules of the Code may affect the characterizatio of amounts treated as realized under the expatriation tax. For ex ample, in the case of stock in a foreign corporation that was a con trolled foreign corporation at any time during the five-year perio ending on the date of the deemed sale, the gain recognized on th deemed sale is included in the shareholder's income as a dividen to the extent of certain earnings of the foreign corporation (see sec 1248).

The bill provides that any period during which recognition of in come or gain is deferred will terminate on the date of the relin quishment, causing any deferred U.S. tax to be due and payable a the time specified by the Treasury Department. For example where an individual has disposed of certain property (e.g., propert that qualifies for like-kind exchange under sec. 1031 or as a prin cipal residence under sec. 1034) but has not yet acquired replace ment property, the relevant period to acquire any replacemen property is deemed to terminate and the individual is taxed on th gain from the original sale.

The bill authorizes the Treasury Department to issue regulation to permit a taxpayer to allocate the taxable gain (net of any appli cable exclusion) to the basis of assets taxed under this provision thereby preventing double taxation if the assets remain subject t U.S. tax jurisdiction.

Effective Date

The provision is effective for U.S. citizens who relinquish thei U.S. citizenship (as determined under the bill) on or after Februar 6, 1995. The tentative tax will not be required to be paid until 9 days after the date of enactment of the bill.

Present law will continue to apply to U.S. citizens who relin quished their citizenship prior to February 6, 1995.

IV. BUDGET EFFECTS

A. COMMITTEE ESTIMATES

In compliance with paragraph 11(a) of rule XXVI of the Standin Rules of the Senate, the following statement is made concernin the estimated budget effects of the bill (H.R. 831) as amended an reported by the Committee on Finance.

The bill as amended is estimated to have the following effects o budget receipts and outlays for fiscal years 1995–2000:

[33] Because there is no meaningful concept of citizenship of a U.S. territory or possession, th Committee intends that the provision not be "mirrored" for application in the U.S. territorie and possessions that employ the mirror code.

ESTIMATED REVENUE EFFECTS OF H.R. 831 AS REPORTED BY THE SENATE FINANCE COMMITTEE

[By fiscal years, in millions of dollars]

Provision	Effective	1995	1996	1997	1998	1999	2000	1995–00	2001–05	1995–05
1. Extend self-employed health deduction: 25% for 1994 and 30% thereafter	12/31/93	−514	−482	−527	−587	−649	−708	−3,467	−4,520	−7,987
2. Repeal section 1071 (FCC tax certificate program)	1/17/95	334	411	135	135	170	201	1,386	1,465	2,849
3. Modify section 1033 for corporations with transition rule for microwave relocation previously entitled to section 1071 (non-recognition of gain on involuntary conversions not to apply to acquisitions from related persons).	2/6/95	5	9	23	33	47	67	184	689	873
4. Deny earned income tax credit to individuals with interest, dividends, tax-exempt interest income and net rental and royalty income over $2,450 (the $2,450 threshold is not indexed for inflation) [1].	1/1/96	....	21	415	465	501	540	1,941	3,372	5,313
5. Revise tax treatment of renouncers of citizenship [2]	2/6/95	47	144	197	257	322	392	1,359	2,274	3,633
Net totals		−128	103	243	303	391	492	1,403	3,280	4,681

[1] Included in this estimate are decreases in EITC outlays of $17 million for FY 1996, $334 million for FY 1997, $375 million for FY 1998, $409 million for FY 1999, $439 million for FY 2000, $468 million for FY 2001, $504 million for FY 2002, $540 million for FY 2003, $579 million for FY 2004, and $622 million for FY 2005.

[2] Modified version of Administration's revenue proposal.

Note.—Details may not add to total due to rounding.

Source: Joint Committee on Taxation.

B. BUDGET AUTHORITY AND TAX EXPENDITURES

Budget authority

In compliance with Section 308(a)(1) of the Budget Act, the Co mittee states that the bill as reported involves decreased bud authority (reduction in outlays) for the reduction in the refunda portion of the earned income tax credit attributable to the char in eligibility relating to certain unearned income (amounts shown above in the table in Part IV.A).

Tax expenditures

In compliance with Section 308(a)(2) of the Budget Act, the Co mittee states that the revenue reduction attributable to the ext sion of the deduction for health insurance costs for self-emplo individuals involves increased tax expenditures, and that the re nue-increasing provisions of the bill involve a reduction in tax penditures (amounts are shown above in the table in IV.A).

C. CONSULTATION WITH CONGRESSIONAL BUDGET OFFICE

In accordance with Section 403 of the Budget Act, the Commit advises that the Congressional Budget Office has reviewed Committee's budget estimates. The Congressional Budget Off submitted the following statement:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 17, 1995

Hon. BOB PACKWOOD,
Chairman, Committee on Finance,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office and Joint Committee on Taxation (JCT) have reviewed H.R. 831, as dered reported by the Senate Committee on Finance on March 1995. The JCT estimates that this bill would increase the defi by $0.128 billion in fiscal year 1995 and decrease the deficit $1.404 billion over fiscal years 1995 through 2000.

H.R. 831 would restore the 25 percent deduction for health ins ance costs of self-employed individuals for 1994, and would crease it permanently to 30 percent thereafter. The 25 percent duction expired after December 31, 1993.

The bill includes several provisions to offset the revenue l from extending the deduction. First, H.R. 831 would repeal the p vision of the Internal Revenue Code that permits nonrecognition gain on sales and exchanges effectuating policies of the Fede Communications Commission and would prohibit nonrecognition gain on involuntary conversions in certain related-party tra actions. Also, the bill would deny the earned income tax cre (EITC) to individuals with interest, dividends, tax-exempt inter income and net rental and royalty income over $2,450. Final H.R. 831 should revise the tax treatment of individuals who nounce their citizenship. The budget effects of the bill are sho below:

BUDGET EFFECTS OF H.R. 831

[By fiscal years, in billions of dollars]

	1995	1996	1997	1998	1999	2000
Revenues:						
Projected revenues under current law	1355.213	1417.720	1475.496	1546.405	1618.306	1697.488
Proposed changes	−0.128	0.086	−0.091	−0.072	−0.018	0.053
Projected revenues under H.R. 831	1355.085	1417.806	1475.405	1546.333	1618.288	1697.541
Outlays:						
Projected EITC outlays under current law	17.260	20.392	22.904	23.880	24.938	25.982
Proposed changes	0	−0.017	−0.334	−0.375	−0.409	−0.439
Projected EITC outlays under H.R. 831	17.260	20.375	22.570	23.505	24.529	25.543

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting receipts or direct spending through 1998. Because H.R. 831 would affect receipts, pay-as-you-go procedures would apply to the bill. These effects are summarized in the table below:

PAY-AS-YOU-GO CONSIDERATIONS

[By fiscal years, in billions of dollars]

	1995	1996	1997	1998
Changes in receipts	−0.128	0.086	−0.091	−0.072
Changes in outlays	0	−0.017	−0.334	−0.375

If you wish further details, please feel free to contact me or your staff may wish to contact Melissa Sampson.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

V. VOTES OF THE COMMITTEE

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of the votes taken during Committee markup of the bill (H.R. 831).

Motion to report the bill as amended

The bill (H.R. 831), as amended, was ordered favorably reported by a voice vote (13 Members were present for this voice vote).

Votes on amendments

The Committee approved a motion (12 yeas and 8 nays) by Senator Roth to (1) repeal Code section 1071, effective January 17, 1995 (as provided in the Chairman's mark), (2) modify the EITC, and (3) use the savings to increase the deduction for health insurance costs for self-employed individuals to 30 percent beginning in 1995. (This amendment was a second-degree substitute for an original amendment by Senator Moynihan, which would have (1) made the repeal of Code section 1071 effective on or after March 15, 1995, with exceptions for investors contributing start-up financing to a minority enterprise before March 15, 1995, (2) applied the section 1033 change effective for involuntary conversions occurring on or after March 15, 1995, and (3) set the limit on unearned income for EITC eligibility at $2,450.

Yeas—Packwood, Dole (proxy), Roth, Chafee, Grassley, Hat Simpson (proxy), Pressler (proxy), D'Amato, Murkowski, Nickl Bradley.

Nays—Moynihan, Baucus, Pryor, Rockefeller (proxy) Brea Conrad, Graham, Moseley-Braun.

The Committee defeated a motion (9 yeas and 11 nays) by S ator Moynihan to: (1) strike repeal of section 1071 and provide a 2-year moratorium on Code section 1071; (2) add a provision preclude tax avoidance through renunciation of U.S. citizenship; increase the self-employed health deduction to 30 percent in 1 and thereafter; (4) permit the State of New York to continue op ating inpatient hospital reimbursement system; (5) exempt fr excise tax diesel dyeing rules those States exempt from the Cle Air Act diesel dyeing rules under EPA regulations; (6) provide s cial rules for marina operators that sell and recreational boat who buy dyed diesel fuel; (7) apply the section 1033 change eff tive for involuntary conversions occurring on or after March 1995; and (8) set the limit on unearned income for EITC eligibil at $2,450. The roll call vote was as follows:

Yeas—Moynihan, Baucus, Bradley, Pryor, Rockefeller (pro Breaux, Conrad, Graham, Moseley-Braun.

Nays—Packwood, Dole (proxy), Roth, Chafee, Grassley, Hat Simpson (proxy), Pressler (proxy), D'Amato, Murkowski, Nickles.

The Committee defeated a motion (10 yeas and 10 nays) by S ator Bradley to limit the deduction for health insurance costs self-employed individuals to 25 percent and to use the savings deficit reduction. The roll call vote was as follows:

Yeas—Packwood, Chafee, Simpson, Moynihan, Bradley, Roc feller (proxy), Breaux, Conrad, Graham, Moseley-Braun.

Nays—Dole (proxy), Roth, Grassley, Hatch, Pressler, D'Am Murkowski, Nickles, Baucus, Pryor.

The Committee defeated a second-degree substitute motion yeas and 13 nays) by Senator Moseley-Braun to the above Brad amendment. The Moseley-Braun amendment would delete the roactive dates in the previous Roth amendment, and make dates prospective. The roll call vote was as follows:

Yeas—Moynihan, Pryor, Rockefeller (proxy), Breaux, Conr Graham, Moseley-Braun.

Nays—Packwood, Dole (proxy), Roth, Chafee, Grassley, Ha (proxy), Simpson (proxy), Pressler (proxy), D'Amato (proxy), M kowski (proxy), Nickles (proxy), Baucus, Bradley.

The Committee approved a motion (voice vote) by Senator Br ley (cosponsored by Senators Conrad and Moseley-Braun) to (1) pose a tax on people who relinquish their U.S. citizenship and use the revenues for deficit reduction (13 Members were present this voice vote.)

VI. REGULATORY IMPACT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Ru of the Senate, the Committee makes the following statement c cerning the regulatory impact that might be incurred in carry out the bill (H.R. 831) as reported.

Impact on individuals and businesses

Section 1 of the bill as reported reinstates the 25-percent deduction for health insurance costs for self-employed individuals for 1994 and permanently extends the deduction at 30 percent for 1995 and thereafter. Expeditious enactment of this provision will allow self-employed individuals to be able to file their 1994 income tax returns with certainty concerning the deduction and not have to file amended tax returns.

Section 2 of the bill as reported repeals Code section 1071 (relating to nonrecognition of gain on certain broadcast properties under the FCC tax certificate program), generally effective for sales or exchanges on or after January 17, 1995, and for sales or exchanges before that date if the FCC tax certificate with respect to the sale or exchanges is issued on or after that date. Thus, a sale or exchange of broadcast properties is subject to the same general tax rules applicable to other taxpayers engaged in the sale or exchange of a business.

Section 3 of the bill as reported modifies Code section 1033 to provide that, in the case of a C corporation, deferral of gain is not available when replacement property or stock is purchased from a related party, effective for involuntary conversions occurring on or after February 6, 1995. Also, the bill provides that sales or exchanges involving microwave relocation transactions that are certified by the FCC as having been made in connection with the relocation of the taxpayer from the 1850–1990MHz spectrum by reason of the FCC's reallocation of that spectrum for use for personal communications services (PCS) will be treated as involuntary conversions under section 1033. The microwave relocation provision applies to sales or exchanges occurring before January 1, 2000.

Section 4 of the bill as reported denies the earned income tax credit (EITC) to taxpayers if the aggregate amount of interest income (taxable and exempt), dividend income, net rental income and royalties exceeds $2,450 for taxable years beginning after 1995.

Section 5 of the bill as reported provides that U.S. citizens who relinquish their citizenship will be required to recognize, and pay income tax on, unrealized and deferred gains with respect to property held immediately prior to the expatriation. The provision is effective for U.S. citizens relinquishing citizenship on or after February 6, 1995.

Impact on personal privacy and paperwork

Section 4 of the bill as reported will involve an additional calculation by taxpayers who may be eligible for the EITC to determine if they are subject to the $2,450 limit on unearned income.

Section 5 of the bill as reported will involve increased reporting of information to the Federal Government for U.S. citizens who relinquish their citizenship and the filing of additional tax forms to comply with the provision.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL

In the opinion of the Committee, it is necessary in order to expedite the business of the Senate, to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate

(relating to the showing of changes in existing law made by tl provision of H.R. 831 as reported by the Committee).

VIII. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATORS MOYNIHAN AND MOSELEY-BRAUN

During the Finance Committee's consideration of H.R. 831, Senator Moynihan offered amendments that would have eliminated the retroactive repeal of Internal Revenue Code section 1071 from the bill. Section 1071 authorizes the Federal Communications Commission to provide tax deferral to sellers of broadcast properties when such sales effectuate FCC policies, including sales to minority purchasers to foster program diversity. The Chairman's mark proposed to use the revenue generated from retroactive repeal of section 1071 to pay for the permanent extension of the 25 percent deduction for health insurance costs of the self-employed.

Senator Moynihan's amendment proposed instead an alternative source to raise the same revenue: a proposal from the Administration's Fiscal Year 1996 Budget designed to prevent tax avoidance by U.S. citizens who renounce their citizenship. This amendment accomplished the primary objective of H.R. 831, that is, to act expeditiously on the 25 percent health insurance deduction for the self-employed prior to the filing deadline for the 1994 tax year. Retroactive repeal of section 1071 was not necessary to accomplish this objective. With modest changes to the earned income tax credit (EITC) provision in the Chairman's mark, the amendment provided sufficient revenue to allow a permanent extension of the self-employed health insurance deduction at an increased level of 30 percent.

Valid questions have been raised about the way that section 1071 is currently being administered. Recognizing this fact, the amendment would have provided a moratorium of up to two years on the provision. The Administration is undertaking a comprehensive review of all federal affirmative action programs. The moratorium would provide adequate time for the Congress to review section 1071 and affirmative action policies generally, consider the Administration's recommendations and develop a reform proposal. During the moratorium period, no FCC tax certificates would be issued and applications for tax certificates would not be processed by the FCC. Section 1071 was enacted more than 50 years ago, in 1943, and its application to sales to minority purchasers has been in place for 17 years, since 1978. It is only reasonable to expend more than a few weeks when making significant changes to the provision. The necessity of acting quickly on the extension of the self-employed health insurance deduction precludes that kind of deliberation.

The amendment would also have eliminated the retroactive aspect of the repeal of section 1071. The Committee is aware of at least 19 transactions that were negotiated in reliance on the exist-

ence of section 1071 and had FCC tax certificate applications pe ing at the time the House voted to retroactively repeal the pr sion. In many of these cases, the parties had signed definitive p chase agreements (subject only to issuance of an FCC tax cer cate), filed applications for FCC tax certificates, and expended h dreds of thousands (in some cases, millions) of dollars in nego tion costs. All done in reliance on an FCC policy that had been place for 17 years and had been expressly reaffirmed by Congr in each annual appropriations bill for the FCC since 1987, most cently in appropriations legislation passed in August 1994. In case of the sale of certain cable TV systems by Viacom, a tra action that has received much press attention, we are advised t negotiations with the buyer had commenced in July 1994, m than 6 months before there was any indication that section 1 might be modified. The Chairman of the Ways & Means Commit announced in a press release on January 17, 1995 that sect 1071 might be modified, and that any changes later decided on the Ways & Means Committee would be retroactive to the dat the press release. By the time of the press release, we are advi that the parties to the Viacom transaction had expended more tl $15 million in negotiation costs, and that the definitive term the $2.3 billion transaction had been settled—which is amply denced by the signing of the agreement on January 20, 1995 mere three days after the release. Eighteen other transactions w proceeding in similar reliance on the law in effect on January 1 at least that is the number of which we are currently aware.

Businesses cannot plan, cannot negotiate, and cannot compete a fair basis under the threat of this kind of retroactive reversal the law. The critical issues are adequate notice and justified r ance. We believe that the affected parties justifiably relied on law in effect when they entered into their transactions, and tl the notice they received was not adequate. This kind of retroact legislating should not be done.

In addition to paying for an extension of the self-employed hea insurance deduction without resort to a retroactive repeal of sect 1071, the amendment contained two additional time sensitive p visions.

First, the amendment included a measure providing that the d sel fuel dyeing requirements for tax administration purposes, acted in 1993, would not apply in any State that is exempted fr the fuel dyeing requirements of the Clean Air Act. Alaska curren has such an exemption, due to the fact that over 90 percent of diesel fuel used in that state is used off-road and not subject to Clean Air Act requirements. Similarly, over 90 percent of the die fuel used in Alaska is used for nontaxable purposes. Conform the fuel dyeing rules for environmental and tax purposes is ju fied, and needs to be accomplished expeditiously. In addition, amendment would have permitted the use of dyed diesel fuel recreational boating purposes during calendar year 1995, so long the diesel tax is collected at the retail level.

Second, the amendment contained another provision of a ti sensitive nature related to health care. The amendment wo have permitted the State of New York to continue operating an patient hospital reimbursement system that has been in place si

1983. The reimbursement system, in which all payers except Medicare participate, provides substantial support to hospitals for the cost of care to the uninsured by imposing a surcharge on each inpatient hospital bill. This reimbursement system is being challenged in the Federal courts as impermissible state regulation of employer group health plans. A statutory provision covering this reimbursement system was added by Senator Moynihan to the Omnibus Budget Reconciliation Act of 1993, but will expire on May 12 of this year. The amendment would have provided an exemption for the reimbursement system through 1996.

In summary, the Moynihan amendments addressed the time-sensitive need to extend the self-employed health insurance deduction in advance of the 1994 tax filing deadline without embroiling that issue in the twin controversies of precipitous repeal of the minority broadcast tax preference program or of retroactive tax provisions. We regret that it did not pass.

DANIEL PATRICK MOYNIHAN.
CAROL MOSELEY-BRAUN.

O