

103
**DISCRIMINATION IN THE TELECOMMUNICATIONS
INDUSTRY**

Y 4. SM 1:103-83

Discrimination in the Telecommunica...

HEARING
BEFORE THE
SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE, AND URBAN DEVELOPMENT
OF THE
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
SECOND SESSION

WASHINGTON, DC, MAY 20, 1994

Printed for the use of the Committee on Small Business

Serial No. 103-83



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DISCRIMINATION IN THE TELECOMMUNICATIONS INDUSTRY

FRIDAY, MAY 20, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE, AND URBAN DEVELOPMENT,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2359-A, Rayburn House Office Building, Hon. Kweisi Mfume (chairman of the subcommittee) presiding.

Chairman MFUME. If I could have everyone's attention, the subcommittee will come to order. Members of the subcommittee, distinguished guests, ladies and gentlemen, I am pleased to welcome you today to today's hearing of the Small Business Subcommittee on Minority Enterprise, Finance, and Urban Development. It is, as you know, on the topic of "Discrimination in the Telecommunications Industry." By making development of a national information infrastructure a principal element in its high technology/economic development policy, the Clinton-Gore administration has focused much attention on the potential for broad application of advanced information technology and telecommunications resources to social needs as well as to economic development.

The term "information superhighway" has become virtually synonymous with the evolution in the telecommunications infrastructure that will have the ability to link, through personal communication services, homes, businesses, government, hospitals, and education to each other. In fact, it will become commonplace.

One writer recently suggested that the information superhighway could affect American life as profoundly as railroads, interstate highways, telephones, and television. Another wrote that the information superhighway is bigger than the Industrial Revolution, more important than the urbanization of America and perhaps even more sweeping than the development of the microprocessor.

I choose, as others related to this subcommittee choose, to call it potentially one of the greatest business opportunities for small and minority entrepreneurs in our lifetime. The one caveat is that access to this opportunity is contingent upon how the Federal Communications Commission adopts its regulatory scheme to lower the significant barriers to entry into this lucrative field.

Now, over the past several years, the House Energy and Commerce Subcommittee on Telecommunications and Finance, chaired by the Honorable Ed Markey of Massachusetts, has explored the

critical and diverse issues involved in developing a comprehensive telecommunications policy for this country. Resolving those issues, according to Chairman Markey, is of major concern to his subcommittee because in his words, and I quote, "The goal of a seamless, open, and flexible information superhighway depends, in part, on knowing who owns the roads and understanding what are the rules for getting on and for getting off."

Let me state for the record that those broader issues are best left to that committee and are beyond the narrow focus of today's hearing.

One then might ask why a Small Business Subcommittee is interested in issues traditionally associated with another committee's province. That answer, as some of you know, is found in statutory language contained in Title VI of the Omnibus Budget Reconciliation Act of last year, which grants the FCC authority to use competitive bidding procedures to award licenses for the use of the radio spectrum.

Among the goals of promoting new technologies and efficiently utilizing the spectrum for the public benefit, Congress directed the FCC to promote economic opportunity and competition by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, collectively referred to hereafter as "designated entities."

In prescribing regulations pursuant to this mandate, Congress also charged the Commission with ensuring that these designated entities are given the opportunity to participate in the provision of spectrum-based services. This language not only invokes, then, the oversight jurisdiction of this subcommittee but the limited nature of radio frequency spectrum and the high demand makes spectrum licenses a valuable commodity. Thus, the specific rules chosen by the FCC to ensure designated entity participation in spectrum-based services is then absolutely critical.

It has been well documented that Hispanics, African-Americans and Asian-Americans have been historically underrepresented in broadcast communications. The lack of minority participation in emerging telecommunications technologies, however, has only been recognized in recent years by some. Findings of the FCC Small Business Advisory Committee, published last year, put the current issues that confront the designated entities in perspective.

In sum, the SBAC found that barriers to full participation by minority and women-owned businesses in existing telecommunications markets are exacerbated by the lack of capital, concentration of ownership, and the unique problems that are associated with racial and gender bias.

So, then, today we have an opportunity to hear from a broad range of parties interested in the accelerated development of a regulatory framework that will govern an information infrastructure capable of supporting a wide range of interactive personal communication services.

The interests of our distinguished witnesses are varied indeed. We have a respected Member of Congress, who will be joining us later to give testimony, who has over the years sought to ensure that adequate consumer and competitive safeguards prevail in this

country. We have, as you know, the Chairman of the Commission charged with crafting the rules, which combines industry and public policy goals, and we have a service provider interested in taking advantage of opportunities which promise to revolutionize the way we live.

With regard to the Commission, let me also state for the record that this hearing is not an attempt by this subcommittee to determine in advance future rulemaking by the FCC on emerging technologies. We do, however, hope to highlight some of the historical impediments to minority-owned businesses entering the telecommunications industry and to encourage the FCC to adopt its regulatory scheme to recognize and to counterbalance the entry barriers in PCS and other emerging technologies.

Before I introduce the first witness, let me advise members of the subcommittee and witnesses of the constraints of our time, and that those constraints require that we proceed under the 5-minute rule this morning. I would also advise the witnesses that your written statements will be entered in their entirety in the record. The record will be kept open for 15 legislative days to permit additional testimony from those unable to appear before us today, and subcommittee members will also be permitted to revise and extend their remarks.

[Chairman Mfume's statement may be found in the appendix.]

Chairman MFUME. At this time I would like to yield, in the absence of the Ranking Minority Member, to the gentleman from Missouri, Mr. Talent.

Mr. TALENT. Thank you, Mr. Chairman. I appreciate your holding this important hearing. I believe what I will do, in Mr. Machtley's absence, is just ask unanimous consent, if I could, for him to submit a statement for the record later. I know he will wish to do so.

Chairman MFUME. Fine. Without objection, it is so ordered.

Mr. Hundt, we are very glad to have you with us this morning. We recognize that you have got to be up in New England a bit later this morning and that we are under some constraint with time, but because of the importance and significance of your appearance here and, clearly, your testimony, I would ask that you proceed right away, after which we will, in customary fashion, yield to members of the subcommittee for questions.

TESTIMONY OF THE HONORABLE REED HUNDT, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ACCOMPANIED BY BILL KENNARD, GENERAL COUNSEL, AND JUDY HARRIS, OFFICE OF LEGISLATIVE AFFAIRS

Mr. HUNDT. Thank you, Mr. Chairman and members of the subcommittee. I want to echo, if I may, the statement that you made, Mr. Chairman, about the importance of these issues and the importance of the participation of the group that you called the "designated entities"—the small businesswomen, minorities and rural telephone companies in our communications revolution.

I am delighted you are holding this hearing. It is incredibly important for the Commissioners of the Federal Communications Commission to have the record of this hearing as part of our deliberations as we proceed down the path of auctioning spectrum over

the next 4½ years that Congress has set for the time period during which we shall be conducting auctions of many, many different frequency bands of spectrum. So it is vital for us to have the learning that you will put in the record at this hearing.

I would like to, if I may, introduce two members of the FCC staff who will be able to stay here after I have to leave to be in Boston. The first is my General Counsel, Bill Kennard, and the second is the head of the Office of Legislative Affairs, Judy Harris.

Today, more than ever, as you mentioned, Mr. Chairman, we are in the midst of a communications revolution. New technologies are being developed at a very, very rapid pace. I believe that the right policy for nurturing the communications revolution is a policy of competition, but the framework principles for competition should be choice, opportunity, and fairness, these three things.

Today, I would like to focus in my brief opening remarks on the principle of opportunity. We need to enhance opportunities for all Americans, especially small businesses, women and minorities, to participate in the communications and information sector of our economy. This will be, by the end of this decade, the fastest growing, possibly one of the most significant sectors of our economy, possibly as much as \$1 trillion of gross national product on an annual basis. However, the issue that I know many of the witnesses will be addressing today and that you will be making a fine record on is how we can ensure opportunity for all the designated entities to participate in the ownership ranks in this sector of our economy.

The goal of ensuring equal opportunity through licensing is not new to the FCC. As long ago as the 1960's, we began to promote nondiscriminatory employment policies among broadcast licensees. A decade later, in the 1970's, we began addressing seriously the underrepresentation of minorities among owners of broadcast stations. We adopted in the 1970's tax certificate and distress sale policies to encourage minority ownership of broadcast facilities. We think we had some tangible accomplishments, but those tangible accomplishments are way, way short of the ideal that we should strive for.

Minorities and women represent approximately 64 percent of the American population, yet minorities own only 2.7 percent of broadcast properties. There are only seven minority-owned cable companies in the country, based on our studies; and there is, in the telecommunications sector—telephone and radiotelephone communications—only a 0.5 percent ownership by minorities, based on our studies. Our own Small Business Advisory Committee has found only 11 minority firms in the whole country engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services.

We have a chance, as a country, in the PCS industry that is just getting started, to achieve a much, much better record than these results. That is because Congress gave the FCC authority to license spectrum in PCS and in other technologies through a system of competitive bidding. At the same time Congress gave us the tools to give advantages to the otherwise disadvantaged to greatly increase their opportunity for ownership. Those tools that I am refer-

ring to are installment payments, spectrum set-asides, bidding credits, and tax certificates.

They can be used, as we understand the statute, in combination or separately. They can be used creatively; and we are very, very interested in receiving any advice and views on how they can best be used in combination or separately so as to achieve the goals which you, Mr. Chairman, have outlined and with which I agree. Achievement of those goals is imperative if the designated entities are to obtain full participation in our economy, given the great significance of this sector of our economy.

I would like to, if I can, congratulate Congress, and specifically, Chairman Dingell and Chairman Markey for the language they included in the Omnibus Budget Reconciliation Act of 1993. The job now, of course, is to consider how best to use those tools in connection with all of the spectrum auctions that we may be conducting. As I said, I would love to learn from you all today, and although I do have to leave, I will be studying very carefully the full record that you make.

Thank you.

[Mr. Hundt's statement may be found in the appendix.]

Chairman MFUME. Thank you very much, Mr. Hundt. I have two questions, and then I am going to yield to some of the other Members here; maybe we will get an opportunity to go back around again.

If set-asides for small and minority companies are not going to be used, could you tell the subcommittee what level of bidding credit will be needed, then, to go up against companies with revenue and cash flow, let's say the size of Ameritech or Bell Atlantic or Bell South or U.S. West? And how can any small or minority company competitively then bid, in your opinion, against any of these companies?

Mr. HUNDT. Well, I would say that all of the possible advantages—installment payments, spectrum set-asides, bidding credits and tax certificates—are being considered by us now as we approach reconsideration and auction-specific rules for broadband PCS. Similarly, all of them should be considered as we approach the auction of any spectrum, because it is not just the broadband reconsideration—excuse me, the broadband auction of this fall—but future auctions of spectrum that we should be concerned with.

There will be, I hope, a continuing commitment to auctions of spectrum over time and over the years as more and more spectrum is made available. As you may wish to discuss with Assistant Secretary Irving, more is coming down the pipeline in the future, so first I would say that all these advantages, if you will, should be considered.

As to how you weight each of them, as to how you achieve the desired results of greater opportunity to participate, that unfortunately is not something as to which there is any history to guide us. There have never been auctions of spectrum before in this country.

The first auction of spectrum will be late this summer in narrowband personal communication services (PCS). That may give us some guidance as to just exactly how a combination of these

advantages might be used to achieve the results that you were talking about.

Chairman MFUME. Let me ask a more specific question then. In the second report order, dated March 8, 1994, the FCC disclosed its generic guidelines as to how the auction process would occur with each technology. Now, according to this document, the FCC would consider the use of a wide array of options including tax certificates, bidding credits, installment payments and set-asides. Subsequent to this report and order, specifically the April 20, 1994 rule on narrowband, the FCC announced its decision to develop licenses for both narrowband and IVDS using bidding credits, installment payments, and tax certificates.

Could you tell the committee specifically how it was determined that these preferences were sufficient or would be sufficient in ensuring minority participation in the technology, specifically on the bidding credits? And, in your opinion, was 25 percent sufficient?

Mr. HUNDT. Well, we don't know what the results will be, so I have to grant you at the outset that it remains to be seen. However, I believe that we did make a decision that gives a substantially increased opportunity for participation in the ownership ranks of the designated entities.

I particularly think it is important to note that the bidding credits and installment payments advantages are to be combined, and they should be, in short, added together. They may be of approximately equal weight; it is hard to say in advance of conducting the auction. But if they are of equal weight, then a small business minority or a small businesswoman has an especially enhanced opportunity. That was our interpretation of the congressional intent as applied to those open auction specific rules.

I do have to grant you that it remains to be seen whether our calculations prove in the test of the auction to be valid, but they were based on conversations with numerous entities. For example, I have met with the National Association of Black-Owned Broadcasters, the National Hispanic Media Coalition, the National Association of Hispanic Journalists, Hispanic Caucus, and Minority Media Ownership and Employment Council. Our own Small Business Advisory Committee has reached out to many members of the designated entity group.

These meetings that I have had, I have been told, are the first such meetings with the Chairman of the FCC in 12 years. That is not anything that the FCC should be particularly proud about, but it is noteworthy that we are getting that kind of input and guidance on these questions.

We very, very much hope that we developed for narrowband a combination of advantages that will work to achieve the goals that you described so eloquently, but I freely admit that since there is no history to guide us and there is no laboratory that we can use to run this, it remains to be seen what will occur. This is one of the reasons why we wanted the narrowband auction to precede all other auctions, because it seemed to us there were enough narrowband licenses, and they were of sufficiently varied scale and scope that it would be a good opportunity to learn exactly how this combination of advantages will work out.

Chairman MFUME. Well, I am going to maybe pursue that in the next round. Some of those groups, by the way, that you mentioned are here. They, as you know, have an overriding interest in what is going on.

The Chair recognizes Mr. Talent of Missouri.

Mr. TALENT. Thank you, Mr. Chairman.

Mr. HUNDT, I am intrigued by your remark that this is a new process, it is a laboratory in a way. Were you able to consult with any other agencies either on the Federal or the State level that might have had some similar experience? I mean, is this a totally new thing because of the FCC's—I mean, obviously, trying to encourage minority and women-owned participation is not a new thing for the government, and so there ought to be some principles that you could take or some practices you could take from what other agencies have done and apply them. But at the same time, I recognize that your province is rather unique. Did you try and develop any kind of coordinating principles or work with other agencies along those lines?

Mr. HUNDT. Well, all other agencies have had an opportunity to give us advice and guidance as appropriately documented, and that still remains the case; and it may well be that you will be collecting testimony from other government agencies. I think that you will, if I understand the line-up today, so I would say yes is the answer to that.

While it is true that there has never been an auction of spectrum before, it is also the case that we do have experience with, for example, tax certificates and installment payments; and we have been able to learn at the FCC through that experience that these can be tremendously valuable advantages because they give real points to the—how shall I put it—they permit us to provide opportunities to attract capital, and that is a key issue here. If they work as they have worked in the past, in the future as we go through the PCS auctions, then our hope is that they will significantly assist in the capital aggregation problem.

Mr. TALENT. OK.

Thank you, Mr. Chairman.

Chairman MFUME. Mr. Hilliard of Alabama.

Mr. HILLIARD. Thank you very much, Mr. Chairman. I understand you are somewhat new to the FCC; is that correct?

Mr. HUNDT. I have been there almost 6 months.

Mr. HILLIARD. Tell me, has the FCC established any goals for minority and women participation?

Mr. HUNDT. You mean specific numbers in terms of goals?

Mr. HILLIARD. Well, however—goals in any of the various arenas, the new technologies that are developing or TV stations, UHF or radio stations or whatever.

Mr. HUNDT. Well, for sure, our goal is to do a lot better than we have been doing in the past with the tools available to us. I mentioned the tools. The reason why I think we have a chance to do a lot better in terms of encouraging participation of minorities, women and small business is that the auction as a technique for awarding licenses is a much better technique in terms of the ability to use these different techniques to encourage participation than any previous technique that we ever had available to us.

Mr. HILLIARD. Short of encouraging participation have you set up any numbers?

Mr. HUNDT. We don't have any—

Mr. HILLIARD. Or percentages?

Mr. HUNDT. We don't have any specific quantitative goals.

Mr. HILLIARD. Do you have any personal goals?

Mr. HUNDT. Our personal goals are that it would be ideal if the picture of America that is really out there bore some relationship to the ownership picture for communications in the future; but that is a very important ambition to hold to because we have a long way to go as a country in getting to that kind of parallelism between the demographic picture of the country and the ownership ranks in communications.

Mr. HILLIARD. Just like diversity, participation is not just going to happen; it doesn't work that way in a capitalistic system, and unless there are some concrete efforts, concrete goals, it is just not going to work. I just don't believe things just are going to happen fairly in America.

I have been here a little over half a century, and I just don't see that, and I haven't seen it in the past, and I realize you are just getting there, but it does disturb me that you don't have goals either—well, do you have some guidelines?

Mr. HUNDT. In the EEO area, we do have specific goals and guidelines; and there, we have found that there is a much greater parallelism between the demographic picture of America and the employment picture in broadcast and in cable. We haven't done very badly in that respect. We have done rather well, although we can probably do better.

We are turning now in the EEO area to the telephone industry, and for the first time, under the leadership of our General Counsel, we are in the process of investigating whether the employment picture in telephone company ranks is what it ought to be in comparison to the demographics of America.

Mr. HILLIARD. All right. Let me ask you one other question.

During the time you were considered for this job and you talked to the administration, were you charged with certain responsibilities in carrying out the theme of diversity and participation?

Mr. HUNDT. That is part of the statute, as I read it; it is part of the Communications Act of 1934, and it is also part of the Omnibus Budget Reconciliation Act of 1993. I think our responsibilities are right in there.

Mr. HILLIARD. Well, the reason why I am asking these questions is because the law is there, but if there is not a will to carry out the law, then historically we have seen ways in which the law has been circumvented—rules, regulations—so it really comes down to the individuals who participate and who carry out the law. I want to have a good feel about you assuming the responsibility of carrying out the law and having the desire to make sure that it is carried out.

Mr. HUNDT. I totally agree with you, Congressman, and this is a very similar discussion to the one the Chairman and I had in his office a couple of months ago when my General Counsel and I talked to him about how important we thought it would be if he would hold this hearing today. Because we all, all the commis-

sioners, need the guidance that Congress can give us and the record that Congress can make at this hearing.

Mr. HILLIARD. I would just like to see you 6 months from now. Thank you.

Chairman MFUME. The Chair recognizes Mr. Tucker of California.

Mr. TUCKER. Thank you very much, Mr. Chairman.

Good morning to you, Mr. Hundt. You were being asked by my colleague about goals, and you indicated that there were no specific goals that you had outside of the area of EEO. Is that just statutory, or what is the reason for that?

Mr. HUNDT. What I mean to be saying is, there are no specific, concrete numbers for participation in ownership. In other words, we don't say that X percent ownership is a goal that we should strive for. What we want to strive for is a fair and, therefore, greatly enhanced opportunity for participation by all the designated entities. It is our perception that the "designated entities"—this is an awkward term that the statute gives us, but it means small businesswomen, minorities and the rural telephone companies in the context of the spectrum auctions—it is our concern that those designated entities don't have nearly the same opportunities as others to participate in this auction on a level playing field.

They need us to help them with the capital aggregation problem. That is a problem both at the stage of bidding and it is a problem at the stage of actually trying to develop the business, when you need to raise even more capital to develop the business. So, our goal is to make sure that there very much is a level playing field, and there isn't one naturally.

We need to make sure that we give them advantages so as to get it to be level, but what we don't have is a specific target of a specific percentage of ownership that should exist down the road. What we do have is a very specific and heartfelt commitment to making sure that not only is there a real opportunity to participate in the bidding, but that it is a real opportunity for the designated entities to be successful as business persons down the road, so that years from now we will look back and say, there are minority-owned PCS businesses in significant numbers. As I said before, regrettably we cannot say that now about cable, cannot say that now about the telephone industry.

Mr. TUCKER. As it relates to those targets and goals—and as you said, you don't have any specific numbers as to where the goals would go; nonetheless, you today recognize and acknowledge that there are shortages, inadequacies, and insufficiencies. My question is, if that is the case, what kind of information do you have for us that can better quantify where we are and thereby perhaps helping us to direct ourselves as to where we need to go?

There have been numerous studies by Congress and the Commission, and still, to date, there seems to be a shortage of empirical information as to exactly where the deficiencies lie. Could you respond to that and particularly in the area of whether or not you intend to provide some more empirical data in the area of common carrier?

Mr. HUNDT. We are definitely collecting the empirical data right now in the common carrier area. We have some. We need more.

There is a specific task force under way under the direction of Roy Stewart and Bill Kennard and I frankly don't know exactly where that stands now, but I am sure we would be prepared to give you a report on that.

With respect to the specific percentages of ownership, if I might, I would rely, instead of on my memory, on the written statement that I submitted here, which I believe does have specific data about ownership. For example, it is 2.7 percent of broadcast properties and 0.5 percent of telephone and radiotelephone companies, where we see minority control; and those aren't very large percentages at all. We need to do so much better that it is important that we are successful in achieving these purposes in the context of the PCS auction.

Mr. TUCKER. What is your position on distressed sale policy, and are you in favor of expansion of that policy into the common carrier proceedings?

Mr. HUNDT. Well, we have had a distress sale policy for 16 years, if I have counted it correctly, and while it is useful and should be used and possibly should be expanded, it has not done as much as we would like it to do to achieve the goal of minority ownership of broadcast facilities. So, we need to find new and different techniques, as well as using the old techniques; and frankly, I think we need to be more creative about the way that we combine these techniques because, as I mentioned before, notwithstanding good-faith efforts in the past, the results so far have been way, way short of the ideal.

Chairman MFUME. The Chair recognizes Mr. Fields of Louisiana.

Mr. FIELDS. Thank you, Mr. Chairman.

Sir, I was looking at your testimony, and on page 7 of your testimony you stated that the FCC has adopted existing SBA definitions regarding revenue size. Do you feel constrained by the SBA size?

Mr. HUNDT. We don't feel constrained by it. But we do think it is a useful guideline; and I have the understanding that the SBA is considering making changes in its definition, and if it does, we would very, very much like to learn from whatever changes are implemented.

Mr. FIELDS. Well, do you believe that the SBA must change its guidelines before you take any aggressive actions in that area?

Mr. HUNDT. No. I am only saying that we would learn from their changes. They have expertise. Their changes provide useful information to us.

Mr. FIELDS. So what would be your recommendation in order to reach small businesses?

Mr. HUNDT. Well, we are considering—even as I sit here, we are considering whether those guidelines that we do have are appropriate for the PCS auction or whether they ought to be increased; but we certainly would welcome SBA input on that, as we would welcome your input on that.

Mr. FIELDS. Well, it is evident that you are not pleased with the percentage of minority participation today; is that not correct?

Mr. HUNDT. I don't know anyone who thinks that it is a satisfactory result for our country.

Mr. FIELDS. So "anyone in the country" includes yourself?

Mr. HUNDT. It sure does.

Mr. FIELDS. So if you are not pleased with the outcome of the way that the FCC and other agencies are doing business in terms of how we get more minorities to participate in the procurement aspect of government, then do you not agree that you should not sit here and wait on the Small Business Administration or any other agency, but you should take any and every aggressive step possible to make sure that there is an inclusion? So it somewhat disturbs me, when I read your testimony and I see in your testimony that you are waiting, or you are seeking for more information from the SBA when you have the authority and the responsibility to do it absent SBA.

Mr. HUNDT. Well, one thing we absolutely need is a record. We are not waiting on any of these issues. We are, in fact, proceeding expeditiously and have many important decisions on our calendar in the very near future; but we do need a record on which these can be based. That is the only way we are permitted to proceed, and that again is the reason why I am so glad you are making the record here today. We can rely on this in significant part in making our decisions.

Mr. FIELDS. You said there are several important decisions on the table. Can you share with this subcommittee at least two of them?

Mr. HUNDT. Sure. The broadband reconsideration which concerns the appropriate allocation of licenses, in terms of spectrum band width and in terms of geographic definition, is one of those decisions that will be coming up on June 9, if we are able to hold to the schedule, as I very much hope we do. Then at that time or shortly thereafter we will have the auction-specific rules with respect to broadband. Those are probably the two most important imminent decisions that are relevant to the topics we are discussing.

Then I believe that there is the narrowband auction itself, which is very, very important. That will be later this summer, and that will tell us a great deal about whether our calculus already made with respect to narrowband was a right one, whether it works, in short.

Mr. FIELDS. Those decisions will be made approximately when?

Mr. HUNDT. Well, the vote, I hope, will be June 9 for the broadband reconsideration.

Mr. FIELDS. So the decision is in your office?

Mr. HUNDT. It is a vote of all the commissioners, and I am happy to say that we have two new ones confirmed just last night, Susan Ness and Rochelle Chong; so we will be ready to work as a group and we will be deliberating, and then we will be voting on the 9th of June.

Mr. FIELDS. Am I out of time, Mr. Chairman?

Chairman MFUME. The gentleman is out of time.

Mr. FIELDS. Thank you.

[Mr. Fields' statement may be found in the appendix.]

Chairman MFUME. The record will be open for those questions, and we will in turn refer those back to members as soon as we receive comments and answers from Mr. Hundt.

Mr. FIELDS. Thank you, Mr. Chairman.

[The information may be found in the appendix.]

Chairman MFUME. The Chair recognizes Ms. Roybal-Allard of California.

Ms. ROYBAL-ALLARD. Thank you, Mr. Chairman. I am playing a little bit of catch-up right here because, unfortunately, I just came in.

But, Mr. Hundt, did you say in your previous statements that this was the first time that you have heard that there may be some discrimination or problems with regards to minorities and their ability to participate in this area?

Mr. HUNDT. No.

Ms. ROYBAL-ALLARD. Or is this something you have heard before?

Mr. HUNDT. This is something I have been aware of as long as I have been in the communications practice area, which goes back more than 10 years. As a litigator in this area, I am aware of many, many ways in which there have been constant to and fro about increasing minority and women participation in communications ownership ranks. It has been a constant issue, a constant concern and never a fully solved problem.

Ms. ROYBAL-ALLARD. Yet I guess—when I walked in, you were saying that you were glad that the Chair had taken the initiative and had this hearing to gather that information; and I guess what I am wondering is, if you have been aware of this problem for some time, why the FCC itself didn't take the initiative and perhaps meet with the Chair or others to say, this is a problem, we need to do something about it, we don't have the statistics to back it up, and we need your help, rather than waiting for the Chair and this subcommittee to do that.

Mr. HUNDT. Well, as I think the Chair will confirm, Congresswoman, my General Counsel, Bill Kennard and I went to him about 2 months ago and urged him to have this very hearing so that a full record could be made.

Congress was not able to make a full record through a hearing concerning the designated entities language in the Omnibus Budget Reconciliation Act of 1993. The way that came about was such that there wasn't time for this kind of hearing to take place, and it was a question of whether to put that language in without such a hearing or don't have it in at all. Fortunately, it was decided by Congress to put the language in, but it is by no means too late for us to have the record that you are making today; and that is what we discussed with the Chair a couple of months ago, and fortunately, this is all occurring before our vote.

Ms. ROYBAL-ALLARD. The reason I ask that is because I wasn't sure, I didn't quite get that impression from reading your testimony, so I wanted that clarified.

Mr. HUNDT. I am glad you gave me the opportunity to clarify it.

Ms. ROYBAL-ALLARD. Thank you.

Mr. HUNDT. They are telling me I am supposed to—

Chairman MFUME. I know you have to get out of here and catch a plane by 11 am.

I have two other questions, then let me go back to Mr. Fields' remark that a number of us have questions, Mr. Hundt, that we would like to have answers to; and that we will be submitting them and respectfully waiting for you to respond.

Two quick things. An article entitled the \$20 Billion Shutout was dated May 10th of this year from the Capital Markets magazine. It speaks to the concern I expressed earlier regarding a sufficient bidding credit and the Bell Companies' tremendous cash flow that I also talked about.

Were you aware that a brief analysis of information that you have on file as comment at the FCC suggests that large telcos would be able to raise a bid, per pop, of \$14 on the capital markets, with midsize companies raising \$8 and small companies raising \$4? That means that the designated entities that we have been talking about this morning, or the small companies, would need a bidding credit of 72 percent.

Now, can you tell us, is the FCC prepared to come up with a creative way to achieve such a bidding credit or craft preferences that would, in fact, overcome what is clearly an obstacle to the designated entities?

Mr. HUNDT. We are working on exactly those issues. That is exactly what we are looking into right now.

We have everything on the table. We have that information and other information that is being provided to us from other sources, and we are trying to actually do the calculus so that the goals are achieved.

Chairman MFUME. Well, let me try to be a little more specific.

You expect to achieve those goals to come up with a way to overcome the obstacles that minorities are facing in this area regarding bidding credit?

Mr. HUNDT. We are trying to use not just that technique but all the techniques available to us and figure out how best to use all of them, not just bidding credits.

As I mentioned before, the installment payments, for example, is a tremendously valuable calculus. Some people have told us that installment payments equals a bidding credit of 20 to 25 percent.

Chairman MFUME. OK. I am not trying to be funny, but I need you to be very straightforward with me.

Do you expect to achieve a means of doing that? I know you are working on it.

Mr. HUNDT. Well, we certainly desire to achieve it. The only thing I am hedging on is that there is no way to be scientific about this in advance. You cannot tell how the auction will turn out. That is the good and bad part of the auction.

However, we are doing these calculuses right now, and we are trying to figure out how, when you combine the different techniques and tools, you end up with an aggregate result that is, of course, greater than when you use any one of them. Some of them, however, may be redundant and not necessarily add to each other; and that is the calculus that we are trying to make and where we appreciate all the guidance that you and others can provide.

Chairman MFUME. Well, I am not trying to presuppose what will happen at the auction; I don't even want to get to that point. I am talking about a willingness on behalf of the Commission to come up with creative ways to achieve an opportunity that will allow people to get over these barriers.

Let me—just one other question, if I might: How did the FCC view publicly traded companies in the narrowband? In other words,

were publicly traded companies prohibited as designated entities in the narrowband rule?

Mr. HUNDT. May I consult with my General Counsel on that question?

Chairman MFUME. Sure.

Mr. HUNDT. Thank you. Yes, Bill has reminded me that because of the low capital entry requirements—that is to say, you shouldn't have to spend that much money to buy a narrowband license—then publicly traded companies were not permitted to use these advantages.

However, that is not necessarily the way we will go in the future when we consider the auction of licenses where there are high capital entry requirements.

Chairman MFUME. Well, that is encouraging. Let me just suggest, if I might, that the FCC look at some way to treat minority-owned publicly traded companies in light of the capitalization problems that exist. In fact, there is only one in the whole country, and in lieu of that, I would think that that ought to require at least a different kind of look and a different sort of treatment as opposed to the way you treat others in that regard, and given the fact that those same capitalization problems don't exist.

Now, I know you have got a plane to catch, and I promised that I would allow you to do that and not cause you to run very late.

I cannot stress enough, Mr. Hundt, how important this matter is to this subcommittee and to the members of this subcommittee, all of whom, I am sure, would like to spend an hour with you just trying to get on the record some of these concerns; and as a result of that, we will be submitting officially through the subcommittee to you, within 24 to 48 hours, a list of questions that we would hope that we could get a quick response to.

I would ask also if Mr. Kennard and, I believe, Ms. Harris would, in fact, stay here in case there are additional questions that we would like to pose on matters that you will not be here to respond to.

Mr. HUNDT. That would be terrific. Thank you very, very much for doing this, for giving me a chance to talk with you and for holding these hearings.

Chairman MFUME. Thank you very much.

Chairman MFUME. The Chair wishes to call Mr. John Spotila, General Counsel of the SBA, and Mr. Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce.

Mr. Kennard, Mr. Hundt is obviously not here with us. Would you indicate to him, though, that I have offered to correct on the record a statement that he had made earlier in response to one of the members of this subcommittee regarding the genesis of this hearing, that this hearing was planned, scheduled, and conceived of before Mr. Hundt and I met.

As a matter of fact, I think you were at that meeting, at which point we asked him if he, in fact, would be kind enough to appear and give testimony. I don't want to suggest that this hearing is the brainchild of Mr. Hundt in any regard. I want to make sure that we set the record straight in that matter. I am sorry I didn't do

that before he got out of here, but I would appreciate it if you would communicate that to him. Thank you very much.

Won't you please proceed, Mr. Spotila and then Mr. Irving.

Ms. ROYBAL-ALLARD. Mr. Chairman, I assume it was the question that I had asked, and then my follow-up question would have been, then why wasn't it—if he was so aware of all these, why did he have to wait for this subcommittee and your leadership to come and testify on behalf—

Chairman MFUME. I appreciate it, and I wanted to make sure the record was absolutely clear in that regard. Thank you very much.

TESTIMONY OF JOHN SPOTILA, GENERAL COUNSEL, U.S. SMALL BUSINESS ADMINISTRATION, ACCOMPANIED BY JANE BUTLER, DEPUTY ASSOCIATE ADMINISTRATOR FOR FINANCIAL ASSISTANCE

Mr. SPOTILA. Mr. Chairman and members of the subcommittee, thank you for inviting me to appear before you. Accompanying me today is Jane Butler, SBA's Deputy Associate Administrator for Financial Assistance.

Forty-five days ago, on April 5th, the SBA published a proposal to abolish its media policy or opinion molder rule. If adopted as a final regulation, this repeal will allow the agency to provide financial assistance to a greater number of small business owners engaged in the telecommunications and media industries, including minority- and women-owned firms. The public comment period for this proposed rule ends today.

Some background would be appropriate. Under our present regulations, no business loan generally may be made to applicants engaged in the creation, origination, expression, dissemination, propagation or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form or content.

There are some exceptions. We have made loans to commercial or job printers and to publishers of shoppers newspapers, if they consisted of advertising material only without editorial narrative or filler articles. Cable TV systems have been allowed to borrow from the SBA when they passively receive and transmit broadcast signals without exercising judgment as to programs transmitted, but any system that operates a live channel has been found to be ineligible.

We have found general merchandise stores that sell books, magazines, newspapers, tapes, and records to be eligible and also general book or record stores that carry a wide variety of materials; but assistance is not available to specialty book or videotape stores which sell or rent items in a single or limited subject area. The rationale for this distinction has been that a general store covers a broad range of ideas, values and thoughts, rather than a particular or narrow set of ideas or values, and that this should make a difference.

Under our existing rule, academic schools are ineligible, but technical, secretarial, vocational and trade schools have been eligible. Nursery, kindergarten and preschools have been found eligible unless they are primarily engaged in teaching academic subjects.

Making these distinctions in specific cases, as you might imagine, has been very difficult and can lead to inconsistent results from one local area to another. The media policy rule applies to the financing of business loans by SBA, but not to financing provided by small business investment companies which are licensed by the SBA.

Media businesses may borrow from an SBIC which uses leverage from the SBA, but not from a 7-A lender through an SBA-guaranteed loan. The SBA makes physical injury disaster loans to media concerns and academic schools based on humanitarian grounds. The goal here is to help people recover from physical losses due to circumstances beyond their control. But economic injury disaster loans are considered less humanitarian and are restricted by the media policy rule.

There have been several rationales for this rule. Some thought it helped avoid accusations that the government was attempting to control editorial content by subsidizing the media or the communications industry. Others saw it as keeping the agency away from loans to businesses that might publish, produce or sell matters of a controversial nature.

Some believed that freedom of speech and press might be compromised by SBA loans if businesses came to fear government reprisal or if they catered to the government in order to get financial assistance. While respecting past good intentions, the SBA believes that these fears do not give rise to compelling reasons to deny necessary financial assistance to otherwise eligible small business concerns.

Our mission at the SBA is to create jobs and to promote economic development. We believe these considerations and the creditworthiness of the borrower should be our focus in determining where our financial assistance should be directed, rather than any subjective review of the content of materials produced or disseminated by our loan applicants.

The SBA is aware that small businesses in the media industry often have difficulty in raising capital or borrowing money. We believe that the assistance now available to them under present exceptions to the media policy rule and under the SBIC and disaster assistance programs is not sufficient for their needs. Repeal of the media policy rule would make SBA assistance more available to creditworthy small businesses and would provide opportunities for minority- and women-owned businesses, including those which seek to operate PCS licenses or to take advantage of television, radio or other telecommunication opportunities.

Although the Agency has not yet reviewed all of the public comments on our proposed repeal of the media policy rule, the vast majority of early responses support our proposal. We expect to complete our review soon and to publish our final rule within the next 60 days.

I have submitted a report also on 7(a) loan guarantee approvals for minority- and women-owned businesses in the telecommunications industry. While the number of loans and their dollar amounts have increased, we believe SBA and its lending partners can and should do much better.

The president and our administrator are committed to take action to increase lending to minority- and women-owned businesses in general. A number of initiatives are being developed. We believe that modification of the opinion molder rule will help the SBA improve its performance significantly in this area.

Mr. Chairman, let me again thank you for the opportunity to appear before you today, and I would be happy to answer any questions you may have.

[Mr. Spotila's statement may be found in the appendix.]

Chairman MFUME. Thank you very much, Mr. Spotila.

Mr. Irving.

TESTIMONY OF LARRY IRVING, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, U.S. DEPARTMENT OF COMMERCE

Mr. IRVING. Thank you, Mr. Chairman, members of the subcommittee. It is a pleasure to testify before you today on minority business development in the telecommunications industry.

The administration views this issue as a critical component of its national information infrastructure, or NII, initiative. Under the leadership of Commerce Secretary Ron Brown, the department is actively seeking to promote more opportunities for minority-owned businesses in this growing field.

The information superhighway that President Clinton, Vice President Gore, Secretary Brown, and I are committed to helping foster will make life better for all Americans, not just a privileged few. It is our hope that no one will be left off or denied access to this superhighway.

Mr. Chairman, you noted the correlation between other infrastructures and information infrastructures, denoting railroads and highways. One model we don't want to follow is the DC Metro model, where the DC Metro connected affluent suburbs to the downtown district, creating economic wealth and empowerment downtown, while businesses and consumers in Southeast DC and Prince George's County waited for decades for that railroad or that train track to be run past their communities. There are still minority people without cars who are taking buses to get downtown, while people with cars have the advantages of the Metro.

That is not a model that this administration will allow to happen with regard to the information superhighway. On and off ramps will go everywhere; urban and rural communities, affluent suburbs and poor neighborhoods alike. It will bring economic opportunities and improve delivery of health care, education and public safety services to all Americans.

Mr. Chairman, NTIA's Minority Telecommunications Development Program, or MTDP, has actively collected data on the participation of minority-owned broadcast stations on an annual basis since 1990. MTDP found that, as of August 1993, there were 300 minority-controlled commercial broadcast radio and television stations in the U.S., a mere 2.7 percent of total ownership.

Most troubling, Mr. Chairman, from 1992 to 1993, the number of minority-owned broadcast stations actually decreased by 10.

A 1991 Symbiont, Inc. study commissioned by the Commerce Department's Minority Business Development Agency found only 15

minority cable operators in the U.S. and only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging and similar services.

A key to full participation in the NII is ensuring that the minority community and minority entrepreneurs are fully informed about initiatives and the administration is fully informed about minority concerns, and that is why NTIA has worked vigorously throughout my tenure to engage in outreach with the minority community through hearings, speeches and public and private meetings.

Three days ago, representatives and owners of several minority-owned businesses met with an interagency policy committee I chair to share their views with regard to NII, both for business users and owners of telecommunications services.

NTIA and other government officials also have received input from minority business and community leaders through a series of field hearings held throughout the country on universal services and open access. I would like to note and thank Congressman Tucker for his support and his staff's assistance with regard to the South Central L.A. hearing.

An important goal of this administration is to interconnect every American classroom, health care facility, and library by the year 2000, again, by using public and private partnerships. NTIA initiated this year, a new matching grant program, the Telecommunications and Information Infrastructure Assistance Program, that will fund demonstration projects by schools, libraries, health care facilities, and other community organizations in support of the NII. We received 1,000 applications when the round for applications closed last week.

We will ensure that minorities are part of this NII demonstration grant program. In fact, our regulations require special consideration be given to grant applications that involve minorities.

Secretary Brown has made an additional commitment that at least one grant will be awarded to an entity in an empowerment zone, those impoverished or rural areas designated by HUD or the Agriculture Department to receive economic incentives to empower the community economically.

Our intent is to ensure that advanced services will be available everywhere, not just at institutions with the largest endowments or communities with the most economic or political clout.

This administration is committed to ensuring that Howard University and Harvard University have access to the latest computers and technologies. This administration has committed that all students, whether they reside in Bedford-Stuyvesant, Baltimore or Beverly Hills, benefit from the prospects of the NII.

Improvements in education and access to technology alone, however, aren't sufficient to address education and training concerns for minorities. Business training is critical for all entrepreneurial ventures and small businesses, particularly those owned by minorities. MTDP is engaged in activities in this area that predate the NII initiatives but that complement the administration's objectives.

MTDP designed and implemented ComTrain, an executive management training program for new minority broadcast license owners. MTDP began the ComTrain program in June 1990, with funding from MBDA, to promote the viability of minority-owned broad-

casting. A key part of this program is giving new minority broadcasters an opportunity for training for 2 to 5 days at ongoing stations.

MTDP also focuses considerable attention on the issue of access to capital by minority telecommunications firms. Commissioner Rivera of the FCC, head of the Rivera Commission, identified in 1982 access to capital as the single largest problem of minority entrepreneurs. That was confirmed again last year by another FCC commission study, and we have had congressional hearings over the last decade that all identified capital as a major problem.

We are going to have another report this year coming through NTIA on new strategies of capital formation. We are also planning on filing comments supportive of the opinion holder rule.

We also cosponsor annual conferences for startup entrepreneurs, lenders and attorneys in conjunction with NY Law School and the FCC. At the most recent conference in April, we looked at PCS. In response, MTDP developed a list of businesses interested in strategic partnerships with minority and women entrepreneurs and small businesses interested in PCS.

With respect to PCS, on behalf of the administration, NTIA encouraged the FCC last September to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by minorities. NTIA is now reviewing the FCC's rules, specifying the mechanisms such as set-asides, installment payments, and bidding credits allowed for designated entities.

Our focus is on ensuring that enrichment and empowerment happens for entire communities. We wanted to ensure that female and minority entrepreneurs have not just an opportunity to bid or obtain licenses but to succeed as operators when they receive those licenses.

In conclusion, Mr. Chairman, the administration seeks to ensure that all Americans have access to an advanced telecommunications infrastructure and opportunities to participate in the emerging information society. We look forward to working with members of the Congress and subcommittee to help meet that goal.

I would like to note that the Director of the MTDP, Dr. Joann Anderson, is here this morning as well.

[Mr. Irving's statement may be found in the appendix.]

Chairman MFUME. Thank you very much, Mr. Irving.

I appreciate your noting that the administration is committed to a number of different things. I sometimes don't always have faith in the administration, so I would like to know that you are committed and that Secretary Brown and that department is committed.

This administration sometimes has to be held accountable, like any other administration. So, having said that, on page 13 of your testimony, you stated that NTIA's Minority Telecommunications Development Program will be releasing a report soon on its study for new strategies for capital formation.

Mr. IRVING. Yes, Mr. Chairman.

Chairman MFUME. What recommendations would you have here today to improve capital formation for these companies? Could you also tell us when that report will be available?

Mr. IRVING. I don't have a specific date right now. We are still drafting it. I expect it to be due by early fall. We will expedite delivery. We know how important this issue is.

I think the commission has taken a good look. I don't believe there is a silver bullet. But I have spent the better part of my public service career, going back to when Mickey Leland was Chairman of the Congressional Black Caucus, looking at these specific issues.

Most of my professional career, 5 years in telecommunications, I have focused on telecommunications and specifically the entry barriers to minorities. It is an absolute commitment on my part and Secretary Brown's part to do something about that problem.

But I do think you have to start looking creatively. There is a bill which Mrs. Collins has introduced virtually every year. 1983, Congressman Leland offered it; in 1985, 1987, he offered it again; in 1989, he offered it again; when he died, Mrs. Collins picked it up in 1991 and 1993, to extend benefits on the common carrier side.

There are numerous things we have to do as a Nation. I think that one of the things that the FCC has done is to look at installment plans and bidding credits and set-asides and tried to figure out what the right working mechanism is. This has to be done. But I don't think any of us know.

There are millions of dollars being spent on game theory, on how to best game this new auction. We never had an auction in this country. The few countries that have had it aren't really models with regard to how you improve opportunities for minorities.

I don't think we can let any of the potential tools go unused. But I don't know that there are any particular tools that are going to serve the problem. This week I talked to two separate groups, one on Monday, one on Tuesday. They gave completely different strategies to go forward.

Chairman MFUME. Strategies to go forward or strategies for capital formation?

Mr. IRVING. Both. Some minorities would like to joint venture with majority firms. They would like a 10, 20, 30 percent equity ownership and feel they are in the door if they are on the board. Others would like to own and operate. They want to have at least 50 percent ownership. Others would like just to get in the door as a 100 percent owner, if that is possible.

How do we tailor rules that will work for all of those different entities? Some want to play in what are called MTA's, which are large blocks. there are only 51 of them. Others believe regional or local strategy is a better way to go forward. We intend to work with the FCC so that the differing viewpoints can all be used. But I think you have to use every tool at your disposal.

Chairman MFUME. Does Commerce see set-asides as an effective tool?

Mr. IRVING. In some instances. They should not be discounted. But there are certainly legal problems. One of my concerns about set-asides and this is a personal concern—I'm not speaking on behalf of the administration—if they don't withstand court scrutiny, we will have put minorities a couple of steps back with these courts. Who knows? It is not clear. There is no real road map.

The concern is you have cellular companies out there who have 16 million subscribers. They are certainly going to bid for some of the new spectrum available. We have other large companies bidding for this spectrum. If these technologies go forward and the set-asides are struck down, the ability for minorities to be at the starting gate is shut off.

Chairman MFUME. So we need a court test?

Mr. IRVING. We are going to get a court test on bidding credits and on set-asides. Some lawyers—I am one of them—believe that bidding credits may have a slightly better chance than set-asides of withstanding court scrutiny. If that is the case, do we need to factor that in? It is a tough question.

Chairman MFUME. Mr. Spotila, on page 7 of your testimony, you stated the SBA loan guarantees approvals to minority-owned businesses in the telecommunications industry went from 8 in 1989 to 10 in 1993. Now, you use the word “dismal” to characterize it. I can think of some other words that are a little more earthy. But to use “dismal” for just a moment, if we might.

What real impact, given that, would the repeal of the opinion holder rule on the SBA loan guarantee approvals for minority businesses in the telecommunications industry?

Mr. SPOTILA. I think it is going to have a significant impact. I am not sure I can specifically quantify it, but let me describe why that is. One of the reasons that our performance in this area has been so dismal has been that the opinion molder rule has wiped out an entire area of businesses in this small industry by making it ineligible. Radio stations, publishers, a variety of kinds of businesses that would like to serve in this area are completely ineligible. At the same time, we recognize that this is only one step and only one component of what needs to be a comprehensive approach.

There is a great deal more that needs to be done if we are going to achieve better results. We are working at that. We are looking at that in our guaranteed loan program where, with initiatives like our Low Doc program, we should have dramatic results in improving the number of loans to minority-owned and women-owned businesses under way. In fact, today, in San Antonio, we have a major training exercise to get our people ready so in June we can introduce the Low Doc program nationally.

In our venture capital program, we have revamped the small business investment company program with a new participating security and we are hoping to attract large venture capital dollars, which would again be available for small business owners who would like to move into these areas.

So, we are trying to build an integrated approach that uses every tool at our disposal, if you will, to improve performance. It is not an easy task. We recognize that.

Chairman MFUME. The Chair recognizes Mr. Hilliard of Alabama.

Mr. HILLIARD. Thank you very much, Mr. Chairman.

Mr. Spotila, the process of changing the rules that you mentioned earlier, what phase are they in?

Mr. SPOTILA. We have proposed a change of the opinion molder rule, and we had, in issuing that proposal on April 5th, we gave 45 days for public comments. The last day of that comment period

is today. We now will complete our review of all of the public comments received, make a decision as to what the final rule should look like, and then we will publish a final rule, which in all likelihood will be effective 30 days thereafter. So, we are very close to that stage of publishing the final rule.

Mr. HILLIARD. I will get a comment to you before the day is over, but for the record let me say that because of the advances in technology, because of the advancement in our society, that rule is definitely outdated.

Mr. SPOTILA. We agree with you. We think—

Mr. HILLIARD. And it belongs in history.

Mr. SPOTILA. We believe, frankly, certainly Administrator Bowles feels this way, I feel this way, we feel very strongly that our focus of the Small Business Administration should be on small business, on economic development and on the creation of jobs, not on reviewing the subjective content of what might be published by a small business owner.

Let me also just add as a clarification, the public comment period ends today, but certainly if the Department of Commerce or yourself have any thoughts you would like to pass on to us, we will be receptive to them whenever we receive them.

Mr. HILLIARD. All right. Thank you very much.

Chairman MFUME. Mr. Tucker of California.

Mr. TUCKER. Thank you very much, Mr. Chairman.

Mr. Spotila, in terms of the reformation and modification of the media policy rule, and you indicated that within 45, 60 days you should have a final rule, after that final rule, you indicated there is a 30-day period by which it should go into effect; is that right?

Mr. SPOTILA. We typically, that is, more often than not, publish a final rule and make it effective 30 days thereafter. But there are occasions when we shorten that period. A decision has not yet been made. But I would not expect that we would make it any longer than 30 days in terms of the effective date.

Mr. TUCKER. Not that we would want to anticipate defeatism, but is there anything you foresee, any problems, because I notice some hesitation in your comments about the effectiveness after the 30 days.

Mr. SPOTILA. If I gave you that impression, I did not intend to. I have no hesitancy about it, my only hesitancy is as to the specific nature of the final rule, because we don't predispose that before we have completed our review of the public comments. If, for example, the final rule promulgated the proposed rule as written, it would be effective in 30 days, and immediately as of the time it became effective, small businesses which had previously been ineligible for our assistance would become eligible.

Mr. TUCKER. I appreciate that, and I look forward to the publishing of the final rule and sharing with this subcommittee, the Chairman and members of this subcommittee.

Mr. Irving, thank you for coming this morning and testifying representing your department as well as the administration's thought on reformation in this area. You mentioned the TIIAP and the matching grant programs. You also mentioned the fact that you are looking forward to working with those kinds of grant programs in relation with and in connection to empowerment zones. Of course,

we are all, across the country, certainly in my area of South Central and other areas, vying for empowerment zone status.

The downside of the empowerment zone, however, is the fact that there will be so few of them nationally. What is your response or strategy as it relates to that kind of limited exposure for those kinds of grant programs?

Mr. IRVING. With regard to the limited number of empowerment zones, whether or not a community is designated as an empowerment zone, if they put forward a grant proposal that has merit, we are going to take a good hard look at it. We are going to take an especially hard look at proposals from minority areas or minority entities.

I spent last Monday up in Harlem with Percy Sutton and a group he has put together. They are one of the linchpins. One of the things you can use as a lever to create that empowerment zone, to build economic opportunity, is to build telecommunications technology. They believe that in New York, and certainly L.A., being telecommunication centers, right now 10 percent of the our GDP is related to telecommunications technology.

That is going to grow to 14 or 17 percent in the next decade. More jobs will be created in those technologies. One of the concerns I have had over the last year I have had this job, when you talk to people, they focus just on PCS. There are so many other incredible opportunities in telecommunications. We have to get minority communities to be involved in PCS also.

But there are so many other things. We think the grant program can give people an idea of what some of these technologies can mean in education and health care. Empowerment zones are out front. A company that gets involved in a joint venture in New York or Baltimore or Alabama can take what they learn there not only around the rest of the country, but literally around the world.

I am going later this year to Latin America. There are so many great export opportunities. I think we are missing some of those opportunities by focusing too narrowly our perspective on what can be done here.

Mr. TUCKER. I know time is of the essence, Mr. Chairman, so in conclusion, in addition to PCS, you indicated that there were other important objectives, and in your opinion, what would two or three of those be, aside from the international market?

Mr. IRVING. Hardware and software development. If we are successful, and I think we will be, in passing legislation allowing telephone companies and cable companies into each other's business, we have an open system. Right now we have black entertainment television, really the only provider of video services. If you have telephone services and satellite services, there is no reason why minorities couldn't compete with those services nationally.

There are just a myriad of possibilities, limited only by the imagination of entrepreneurs. We want to open that system up. Historically, if you are a minority entrepreneur with content, you had to get past ABC, NBC, CBS, or Fox. If you open a large system, it will be as easy as developing a magazine. There is no reason we can't have minority providers of video content as we have minority providers of print content today.

They are all there because it is an open system. We can open up the telecommunications marketplace with the same opportunity on the contents side. I am trying to promote that idea with minorities.

Mr. TUCKER. Thank you.

Thank you, Mr. Chairman.

Chairman MFUME. The Chair recognizes Mr. Fields of Louisiana.

Mr. FIELDS. Thank you very much, Mr. Chairman.

Mr. Spotila, I have a couple of questions for you. First of all, your testimony on page 5, you stated that the SBA is aware that small businesses and the media industry often have difficulty in raising capital or borrowing money. When did you find that out? Yesterday? A year ago? Three years ago?

Mr. SPOTILA. Well, I joined the SBA in mid-September. I think I knew it before I came, and I have certainly only learned more that has confirmed that previous belief. I can't really speak to when the SBA itself learned prior to this administration. But more importantly, we are aware of it, and we are working to try to change that.

Mr. FIELDS. Well, more importantly, very little has been done to change this. Agency after agency that comes before this panel and other panels that I serve on in this Congress and in other legislative bodies, have always talked about the problem, but have very little in terms of solutions, and every solution is always in the future, and the future somehow never gets here. If the media industry and the agency knows that the problem exists due to problems of capital and borrowing money, the 7(a) program is one of the ways you can eliminate or at least start dealing with that problem.

Even with the 7(a) program, if you look at some of the figures, you say in 1987, 1989, it increased from 37 to 65 loans that were granted to minorities and to blacks. Is that correct?

Mr. SPOTILA. I believe that is correct.

Mr. FIELDS. According to your testimony. Then you move from 44 to—and I think now you talk about \$15 million, \$15.1 million in 1993, and only \$8.5 million in 1994.

Now, that \$8.5 million is compared to what? Because you can sit here and say, "Well, minorities will receive \$8.5 million," and I may jump up and shout, but I don't know whether to be impressed or depressed.

Mr. SPOTILA. We are not at all happy with the performance of our lending program in this area. But let me try to address what I think is really your key concern here, and that is, what are you doing about it?

Let me just talk for a moment about what we are trying to do about it.

The first significant problem we have had, particularly in connection with the media industry, has been that most businesses that have tried to borrow in this area have been declared ineligible by determinations made by our lenders in our field office. They have been ineligible because of the application of the media policy or opinion holder rule. It has eliminated a lot of potential borrowers from eligibility. We are changing that, and that is the reason we are changing that.

The second problem that we have noted is that many of our businesses, and particularly minority-owned and women-owned busi-

nesses, have been in a startup phase where they have needed startup capital, and they often have found it an impediment to deal with SBA in terms of documentation, excessive forms, and a variety of other kinds of things that introduce expense into the system.

So, what we have tried to do from the standpoint of capital, number one, is to make the 7(a) loan program available by eliminating the opinion molder rule, and to look at loans that will be more attractive to startup businesses. So, in our Low Doc area, for example, where we streamline the forms, we make it easier to work with us in our micro-loan program, in a series of initiatives you are probably familiar with, we are trying to look for ways to improve.

In the venture capital area, which is very important for anyone who wants to move into the media or telecommunications industry, because of the dollars involved, we have been working to try to get that program in a position where it can offer more meaningful amounts of dollars to businesses, small businesses that want to take advantage of these opportunities.

I am not suggesting to you that we have all the answers or that we have completed this process, but we are very aware that the only thing that really counts here is results. We are not really trying to just mouth words.

Mr. FIELDS. That is what I am concerned about this morning. In the future, because you probably don't have those numbers with you, but I often ask agencies when they come before panels, Don't just give us half of the numbers. When you tell me that \$8.5 million is being spent, being loaned to minority business, tell me how that relates to the whole picture.

The second thing is, I would like to know how many applications were denied versus those that were approved, because those are very, very important issues that we need to know about in order to deal with the whole problem.

Now, let me just give you some statistics that you are very familiar with because it is a part of your testimony. This really gets to the crux of the problem. If you take the AM stations in America, 4,950 AM stations, of that 4,950, only 110 of those are black. That is 2.2 percent. Many people give the whole number, which is 3.5, but the 1.3 percent of Hispanic, and then two of those are Native Americans. FM stations in America, 4,920 FM stations in America, and only 71 of them are black. That is unconscionable. Unacceptable. TV stations in America, 1,151, and only 19 of those are black, 1.7 percent. I can go on and on and on.

We can talk about these problems all day and all night. But until we take some aggressive measures in addressing these problems in a progressive and in a very meaningful way, we are going to continue to sit here and you are going to be on that side of this table, and I am going to be on this side, and we are going to just talk about the problem. We are going to have committee meetings after committee meetings, and we are going to still have 1.5 to 3.5 percent of African-Americans participating because they can't get access to capital.

Mr. SPOTILA. I agree with you. Let me just point out, all of those AM stations, all of those FM stations, and all of those TV stations were previously and, as of today, still are ineligible to borrow under our 7(a) program because of our media policy rule. So, none of

those minority-owned stations would have received 7(a) loans. That is why it is so important to change this rule, which has interfered with our ability to provide assistance to them.

Mr. FIELDS. The rule has been in existence since before I got into Congress. So, it is not new news to you and it is not new news to me.

The rule should have been changed a long time ago. I appreciate the department taking an aggressive stand today to change the rule. We have got to provide better access to all Americans as relates to the broadcast industry and capital.

Lastly, Mr. Chairman, because I know my time is limited, Mr. Irving, the Chairman made mention of different ways of making sure that minorities get procurement opportunities through Federal agencies. You made some statement about minority set-asides. What is your opinion of minority set-asides?

Mr. IRVING. I believe personally that minority set-asides can be a very helpful tool. I also know there are some questions in the court, and I am concerned about whether or not the questions in the court and the possibility of an overturn of a setaside schematic may in fact hinder the ability for minorities to participate in PCS and some of the other things the FCC is going forward with. I also think it is just one of several tools that the FCC and other Federal agencies have to look at in terms of ensuring access to capital.

If all the FCC did was minority set-asides, it would probably not be sufficient to ensure that minorities not only have the ability to participate in PCS but have adequate capital to go forward.

This administration wants minorities to not just get the licenses, but succeed. Congressman, one of the things about PCS, it is an incredibly capital-intensive industry. You first have to bid for the license against the big boys. Then after you get the license, you have to clear off that spectrum. There are existing microwave users you have to buy out.

So, you need capital to do that. Then the cost of constructing that particular technology is going to be prohibitively expensive. There is a lot—if you just give the set-aside but don't do something to make sure minorities have access to capital to do the other two-thirds of the job, you haven't done enough.

Mr. FIELDS. I thank the gentleman.

I thought that was your view, but I just wanted to make absolutely sure.

Mr. Chairman, if I may, this is the very last.

Mr. IRVING. Congressman, one thing. That view is my personal view. The administration has not taken a full—let me say this—Vice President Gore, Secretary Brown have been very involved in everything we do here. I just don't want to get out in front of my principals. We all know where Secretary Brown stands and Vice President Gore stands.

Mr. FIELDS. I understand. Thank you very much. Mr. Spotila, I apologize if I mispronounce your name, Mr. Under Secretary. Let me—on page 5, again, of your testimony, you stated SBA has also been making physical injury disaster loans to media concerns and academic schools since 1953.

What is the definition of academic schools?

Mr. SPOTILA. For this purpose, I think it has been any school that is a private business, a small business, that offers lessons of any kind, teaching of any kind. I don't know that I can be specific—

Mr. FIELDS. Would public schools be inclusive?

Mr. SPOTILA. Typically not. These are only small businesses we are talking about, I believe. I would be happy to clarify that. The disaster area—

Mr. FIELDS. You went into great detail with the disaster area, but you gave nothing as relates to academic schools. I just wanted to know, relevant to whether we were talking about public schools, or just broadcast schools.

Mr. SPOTILA. The distinction I was making was contrasting vocational or technical schools. This might be a school that taught some other form of knowledge, if you will.

Mr. FIELDS. Why don't you give me a list. If I may, Mr. Chairman, I would like to have a list of all of the schools that have benefited from this academic schools program.

Mr. SPOTILA. Sure. I would be happy to submit any answers to any questions that you would have. We would be happy to supply that information.

[The information may be found in the appendix.]

Mr. FIELDS. Thank you, Mr. Chairman.

Chairman MFUME. Thank you very much, Mr. Fields.

Mr. Irving, let me go back to this narrow focus that I have on PCSs. I say that because that is getting ready to get away from us. That horse is almost out of the barn. While I agree with you that there is a lot of other interest in hardware and software and international opportunities, once that door closes, it is closed. So, that is why I am going back to that. I beg your indulgence.

Given your significant experience with these issues that you have taken time to outline a moment ago, if you and the department had to craft a rule for participation by designated entities in PCS, can you tell this subcommittee then what in fact that would include?

Mr. IRVING. I am certain that it would include installment payments. I am certain it would include bidding credits. I am certain it would include tax certificates. I am certain it would include significant anti-trafficking situations so you don't have fronts. I could not tell you definitively whether or not—it would likely include set-asides. I don't know the specifics of what the set-asides would be.

One other thing we would probably do differently that I would suggest we do additionally, and that the administration is on record we should do differently, the size of the areas is of concern to me. What the FCC has done is create 51 MTA's with two blocks of spectrum. There is another block of 492 BTAs. They are about one-tenth the size of the MTAs.

I think it is difficult given the economies of scale for somebody who has three or four BTAs to compete in a market area with someone who has two or more other providers in that marketplace. I think if the areas were of the same size, it might be easier for minorities to participate, I don't know, given the cost of MTAs.

If we would come out with defined regions, we would make all of them economic areas. That was in our proposal last year. Because MTAs by themselves are so huge, they will cost so much to

construct, but BTAs lose the ability to do the economies of scale. I think you have to look at a mix and match. There are econometric models, tens of millions of dollars, and I don't know what the right answer is.

We definitely share your concerns. I think Chairman Hundt and his four colleagues are trying hard. I have talked to the new Commissioners directly. They all want to make sure that minorities have licenses, but 5 or 10 years from now they are holding those licenses.

Too often we have seen opportunities for minorities. We get in at the front door, one or two minorities benefit by flipping that license over to a majority stakeholder, and we don't want that to happen. It has got to be crafted in a way so that minorities hold onto these licenses to empower the community 5 or 10 years later.

Chairman MFUME. That leads me to my next question, whether or not you are communicating, in your role as Assistant Secretary of Commerce for Communications and Information, with the Federal Communications Commission.

Mr. IRVING. Daily.

Chairman MFUME. And are they listening and hearing?

Mr. IRVING. I believe they are, sir.

Chairman MFUME. Are you making suggestions as part of your communication also?

Mr. IRVING. I am working on two different levels. I am working with the administration, OMB, the Vice President, and Secretary Brown, trying to get their input into this, because this is such an important national issue that they care about deeply, and I am also working directly with Chairman Hundt and his staff, my staff, Joanne Anderson, the other people in my policy shop, Ellen Bloom, who does congressional affairs. We are all working together.

I also talk with Members of Congress on what their intent was, what we need to do. This is a key issue for a lot of different parties. We are doing everything we can to give constructive input into the commission process.

Chairman MFUME. Tell the subcommittee, if you will, for the record, what is Telecap? I hear a lot about it. It is in your pronouncements, statements by the Secretary and the administration. I am still a little lost right now.

Mr. IRVING. Telecap is our effort to ensure that minorities have more information on telecommunications opportunities. We assist in training. We also, as part—it is part of a larger MTDP project. We have ComTrain, Telecap, all of those projects are geared to one thing, bringing information into the Federal Government on the minority community, getting information out, providing training.

One of the problems that Dr. Anderson has been working on for several months is trying to broaden what we are doing with regard to our own internal processes. We have been focusing on broadcasting. That is one technology. We have got to focus a lot more on these newer technologies. Telecap, under a proposal she put before me recently, certainly we would like to try funding to expand it, to get into some of the newer technologies.

Chairman MFUME. Tell me exactly what Telecap does.

Mr. IRVING. So that I don't misspeak—

Chairman MFUME. So that I understand.

Mr. IRVING. I want to bring in Dr. Anderson.

Chairman MFUME. Dr. Anderson, would you come to the microphone and properly identify yourself for the record?

Ms. ANDERSON. Well, this is an interesting change of events. I am Joanne Anderson. I am Director of the Minority Telecommunications Development Program. Telecap is our study on capital development.

The reason we are looking at capital development is because we know there is not enough capital for any phase of business in telecommunications, whether it is startup, whether it is growth, or whether it is mature capital. We are trying to come up with some new models to contribute to the discussion on capital formation.

Chairman MFUME. And have you come up with some models yet?

Ms. ANDERSON. We actually have two draft models that I would prefer not to talk about at this point, but we are looking at some other models, too.

Chairman MFUME. Could you at least talk about when you anticipate those models which are in draft form now to be formally presented and perhaps even adopted?

Ms. ANDERSON. I won't expect for them to be adopted. What we are going to do is come up with models that will look at different techniques that will be used to increase the sources of capital that will be available. We expect a report to come out in the fall. When this report comes out, we will have a series of workshops across the country to make this available to everyone.

Chairman MFUME. OK. Thank you very much. I needed clarification on that. I have heard it over and over and over again and didn't know what it was, what it did, what it looked like, or where it came from. So, I do appreciate that.

Mr. IRVING. I am glad she told us we do have models. But it is very important to us that we get that information out to the minority community as expeditiously as possible. I restate our commitment to get it out hopefully even before the fall.

Chairman MFUME. Those bells indicate that there is a vote on. Unless there are other members of the subcommittee with questions, hearing none, the Chair would like to thank the panelists who have come before us, to remind those who are here as part of the audience that we are expecting the testimony of Representative Cardiss Collins. We will do that after we are recessed for about 10 or 15 minutes.

Thank you very much.

[Recess.]

Chairman MFUME. The Chair is going to ask those Members in the outer area near the door if you would please clear away so that persons might come in and be seated. We would like to continue.

We are still hoping to have Representative Collins before this subcommittee, and until that time, at least, the Chair would like to move on and call forth the next panel.

Mr. Timothy Bates, Professor of the Woodrow Wilson International Center for Scholars; Ms. Margaret Brown, senior vice president, Cook Inlet Region, Inc.; and Herb Wilkins, managing general partner of Syncom.

Thank you very much.

Ms. Brown, why don't we begin with you.

**TESTIMONY OF MARGARET BROWN, SENIOR VICE PRESIDENT,
COOK INLET REGION, INC.**

Ms. BROWN. Mr. Chairman and members of the subcommittee, thank you for inviting my testimony today.

My name is Margaret Brown. I am a senior vice president of Cook Inlet Region, Inc., which we often refer to as CIRI. I have been with CIRI for 18 years. I am an Alaska native, a shareholder of CIRI. I am of Yupik Eskimo descent. I was born in a tiny village called Takotna in the interior of Alaska near the banks of the Kuskokwim River.

On behalf of the our 6,700 Native Alaskan shareholders, I am honored to present our views on the minority preference programs to be administered by the FCC as it awards telecommunications licenses through competitive bidding.

In my testimony today I will describe CIRI and its shareholders, and why the minority preferences really mandated by Congress are vital to us and to other businesses owned by minorities if we are to have an opportunity to realize some of the promises in the telecommunications industry.

But first, some history. Congress passed the Alaska Native Claims Settlement Act in 1971 to address two realities: Alaska natives suffer grave social and economic hardships because of the disruption and dismantlement of their land, culture and life-style; and Alaska natives had demonstrated legitimate and equitable claim to many of the lands in Alaska.

The terms of the settlement were novel, even radical compared to past U.S. and Native American treaties and relations. Rather than form a system of reservations to remove native people from the mainstream of society, Congress directed that Alaska native corporations be established and that they be owned solely by native people. These corporations had two missions: To earn profits for dividend, and attend to the social and cultural needs of their shareholders.

Instead of being outside the economic mainstream of America, Alaska natives were to be a part of it. The Settlement Act has helped Alaska natives but it has not reversed the effects of more than 200 years of disadvantage and discrimination.

We very strongly support the FCC's efforts to bring Native Americans and their organizations, indeed all minority people, into the telecommunications age. But we do not believe that the FCC policies, at least as they are proposed so far, will have much impact in increasing minority and disadvantaged participation.

Finding a place on the national information superhighway will be very difficult, particularly for minority enterprises like CIRI. Many, including the FCC, have recognized that telecommunications operations are highly capital intensive, which makes competing for valuable Federal licenses against entrenched conglomerates especially difficult. Those corporations frequently have markedly greater resources than less established enterprises, and they are able to link those resources with their industry expertise to dominate a particular market or a newly offered service.

That dominance is likely to continue with the advent of competitive bidding for telecommunications licenses. Congress recognized this reality when it directed the FCC to consider a variety of meas-

ures to ensure that designated entities are given the opportunity to participate in the competitive bidding process.

CIRI applauds Congress' efforts to see that the emerging telecommunications opportunity is open to all at the ground level, but is concerned about the proposed rules to implement Public Law 103-66.

From CIRI's viewpoint as a designated entity, as defined by the FCC, we have urged the FCC to approach the issue of preferential measures with caution in order that they withstand scrutiny and that they produce the results truly intended by Congress. Most basically, the FCC's approach to designated entities set forth in the commission's second report and order is too broad.

As CIRI noted in its reply comments to the FCC, the FCC should supplement its existing eligibility requirements by limiting preferential measures to businesses owned by those who are disadvantaged.

When Congress declared that small businesses and businesses owned by minorities and women should be assured meaningful participation in spectrum-based services, the goal was to ensure the participation of groups that are disadvantaged by the presence of unique barriers to their participation in the telecommunications industry.

However, the current approach would allow two of the largest media companies in the Nation with assets valued in billions of dollars to be awarded special preferences at auction simply because they are owned and controlled by women.

Do these companies require special assistance? Was that the intent of Congress? Whether the proposed rule exceeds constitutional guidelines is a complex question and one that CIRI does not attempt to answer today.

However, CIRI has one practical observation. In creating a preference program that applies roughly to 60 percent of the population, the FCC has failed to narrowly tailor the benefits of the program to avoid substantial and prolonged constitutional litigation. While the FCC's Program might ultimately prevail, the intervening litigation will threaten preferences and the auction process.

CIRI has proposed a solution that goes to the heart of the congressional intent. The FCC should adopt preferences to benefit those groups that are disadvantaged. That preference should not be given solely on the basis of race or gender or size. Rather, a preference should be given to an entity that could demonstrate that it was disadvantaged.

In that way, the grant of a preference would comport with the intent of Congress while limiting assistance to those entities that truly need an enhanced opportunity in order to participate.

Specifically, CIRI has urged the FCC to employ the standards already established by the Small Business Administration in determining whether a business is disadvantaged for the purposes of admission to the SBA minority small business and capital ownership development program, which is otherwise known as the 8(a) Program. These existing disadvantaged standards are known and thoroughly tested by the courts.

Our second point today is that once a designated entity passes the disadvantaged test, it must be eligible for all the preferences enumerated by Congress.

Congress directed the FCC to consider bigger credits, tax certificates, and government financing as mechanisms to facilitate participation by designated entities in the programs. However, the FCC should not arbitrarily deny preferences to entities that meet the eligibility requirements.

For example, the FCC recently adopted designated entity preference rules to be applied in competitive bidding for narrowband personal communications services. Notwithstanding the plain intent of Congress to afford preferences to each of the entities designated in the Budget Act, the commission limited the availability of installment payment plans to small businesses bidding for small spectrum blocks.

Limitations of this type are troublesome to CIRI because of the unintended results. For instance, this limitation means that minority-owned businesses that lack access to capital but cannot fit within the FCC's definition of small business will be denied access to government financing.

Moreover, small minority-owned businesses will be offered an installment payment option only when they bid on—

Chairman MFUME. Ms. Brown, let me interrupt you for just a moment. I am going to ask if you could begin to summarize. We indicated at the beginning of the hearing that we would be operating under a 5-minute rule because of time constraints. While we appreciate your testimony, if you could summarize for the subcommittee, we will make sure that the full testimony is part of the official record.

Ms. BROWN. I would be happy to.

The third point that I would just only briefly mention is that CIRI has urged the commission to establish stringent anti-sham requirements which would provide that ownership and actual control be demonstrated and certified and that penalties be established for misrepresentations to the FCC.

We have set out these suggested requirements in our written submission. We feel they would be relatively simple to administer.

In conclusion, CIRI supports the efforts of Congress and the FCC to enact and implement processes that allow historically underrepresented groups such as CIRI to participate at the ground level in the emerging telecommunications business. CIRI is in large part a creature of congressional intent, having been mandated into existence by an act of Congress.

We have also had firsthand experience in the nearly 23 years since the Native Claims Settlement Act was passed dealing with the difficulties of implementing congressional intention so they actually produce the desired result.

It is from this vantage point we express concern over the upcoming FCC decisions implementing Public Law 103-66. Congress directed the FCC to ensure that minorities which have been grossly underrepresented in the telecommunications industry are able to share in this national spectrum resource. CIRI urges this subcommittee to see that the congressional directive is fulfilled.

Thank you.

[Ms. Brown's statement may be found in the appendix.]
 Chairman MFUME. Thank you very much.
 Mr. Bates.

TESTIMONY OF TIMOTHY BATES, PROFESSOR, WOODROW WILSON INTERNATIONAL CEN- TER FOR SCHOLARS

Mr. BATES. Mr. Chairman, members of the subcommittee, ladies and gentlemen, my work for the last 7 years has focused heavily on assisting the U.S. Bureau of the Census in developing highly sophisticated databases describing the Nation's minority business community. In the course of my studies, I have looked extensively at the issue of financial barriers that block minority-owned businesses from broad participation in capital intensive businesses.

Envision the following: Two entrepreneurs starting businesses. Both are college graduates. Both are 40 years old. Both have 18 years of managerial experience. Both are investing \$50,000 of their own money into their business startup.

One of these individuals is African-American, and the other is white. Are these two individuals treated equally by the commercial banking system?

Not even close, no. The differential is wide and striking. Controlling for characteristics such as age, work experience, gender, educational background, what sort of amount of loan dollars does the average African-American business owner—what is the loan dollar received per dollar of owner equity investment? Per dollar of owner equity investment, while the white business owner controlling for these characteristics receives \$1.85, the black business owner receives \$1.16.

Looking solely at firms that do have access to borrowed funds, which would be the stronger firms in the minority business community, the average startup white firm that uses borrowed capital starts out with over \$70,000 in capitalization. The average black business borrower starts out with \$32,800, less than half that amount.

In terms of who provides this debt capital nationwide to the small business community, financial institutions provide more debt capital than all other sources combined.

Mr. BATES. About 65 percent of the white business startups utilize bank credit; 55 percent of the black business startups utilize bank credit. Now, many of these loans that banks extend to young businesses are not actually formally business loans. Many are personal loans, overdraft accounts, home equity loans, even credit cards. When one looks solely at the loan amounts extended by commercial banks to the business startups in the census data, that are represented in the census data, the bank loan recipients, average bank loan for white business startup, \$55,800, black business startup, \$25,700.

So, overall, it turns out that access to capital, even when it is available, translates for the black business borrower and minority businesses more generally, it translates into using sources of credit such as consumer loans, home equity loans, generally smaller, more expensive forms of credit, while the nonminority business

community relies much more heavily on regular small business loans.

The black business borrowers in particular are coming up short and there are actually three reasons for this. The average black business owner has less equity to invest at startup than the average white business owner. For each dollar of equity, the average black business owner receives fewer dollars of debt, and then when we look at the other sources of capital utilized to launch business startups and to propel small business, the other two major sources of debt are family and friends.

The problem of low equity is rooted in low household wealth. Looking at household wealth, one finds that particularly in capital-intensive industries, individuals entering capital intensive industries, starting capital intensive industries, very frequently have personal net worth in excess of \$100,000.

Now, figuring out the proportion of African-American households nationwide that have marketable personal net assets exceeding \$100,000, my studies indicate that this is 4.2 percent of African-American households. Within the nonminority community, over 22 percent of households have net personal marketable assets in excess of \$100,000.

This paucity of household wealth within the black community means that family and friends tend to be less of an accessible source of back-up debt, and combined with the fact that the lower equity is matched with a lesser ability to leverage when one does borrow from financial institutions, it adds up to a situation where the black business borrower, both at startup and at early stages of business development, is going to be at a substantial disadvantage. The substantial disadvantage translates, in fact, into less entry into capital intensive businesses across the board and, number two, starting of overly small firms that are inadequately capitalized. Inadequate capitalization at startup often translates into a higher rate of business failure.

In summary, all three major debt sources—financial institutions, family and friends—are going to provide more credit to the nonminority owner than to the black business owner, and the same situation actually applies to venture capital. Both are a portrait of less access, and controlling for borrower characteristics or investor characteristics, less venture capital is accessed.

Now, when it comes to the types of businesses where financial capital constraints are most binding, of course it is the capital-intensive businesses where financial capital constraints are going to lessen minority business representation. Now, in terms of the small business community, the main single area where there is substantial minority representation that is highly capital intensive is durable goods manufacturing.

In durable goods manufacturing, minority representation in African-American representation specifically is much lower than in other fields. Looking at communications, I tried to calculate similar estimates, but I am dealing with databases. I have to have data before I can generate statistics, and I was unable to even come up with meaningful statistics because of the paucity of minority-owned businesses in the communications area in the Nation's small business databases.

So, minority representation and capital-intensive emerging industries is, in the absence of some sort of specific government intervention, going to continue to be low in the future as it has been in the past. Minorities generally, and African-Americans specifically, are largely shut out by financial capital barriers that tend to skew self-employment patterns toward the less capital-intensive predominantly service industries.

Thank you.

[Mr. Bates' statement may be found in the appendix.]

Chairman MFUME. Thank you very much, Mr. Bates.

As I indicated before, what we are trying to do here this morning is to establish for the first time a real and meaningful record that Mr. Hundt, who is no longer with us, referred to as something that would be an invaluable tool, so we appreciate your testimony, your testimony, Ms. Brown. Mr. Wilkins, we will turn to you and ask you to begin and keep in mind the constraints that we are working under.

TESTIMONY OF HERBERT P. WILKINS, SR., MANAGING GENERAL PARTNER, SYNCOM, INC.

Mr. WILKINS. Thank you, Mr. Chairman.

My name is Herbert Wilkins, and I am Managing General Partner of the Syncom group of venture capital companies. The Syncom Venture Capital Funds are minority owned and were formed initially in 1977. Since then we have accumulated roughly \$63 million of capital under management. Since 1977 we have financed over 82 communications deals that are owned, most of them, by minorities. Today we have 34 active deals in our portfolio.

Our deals cover radio, cable, television, cellular, MMDS and the like. We have been involved during this period of time in the financing of cable systems. In Los Angeles, we presently have investments in the systems serving Boyle Heights in the city of Los Angeles, East Los Angeles, El Monte, the city of Southgate.

We have under contract a cable system which serves several different communities, including Hacienda Heights and a host of others in the L.A. area. In the aggregate when we complete that deal, we will have roughly 72,000 cable subscribers in the L.A. market.

We have also been involved in the construction of KBLE in Columbus, Ohio, Seattle, Washington cable franchise, the city of Newark, Connection TV which we recently got out of when it was sold to Cablevision a year ago this past April. We have been involved in system construction in Albuquerque, New Mexico, east Cleveland, Ohio. We presently own a significant investment along with a minority group in Chicago, in south Chicago, Cable TV Company, a system which has presently 220,000 cable subscribers where the local minority group owns 10 percent of that system.

We are an investor in Washington, in the DC cable TV franchise. In New York City one of our companies, Urban Transport Corporation, in December was awarded a wire line broadband franchise for all five boroughs of the city of New York.

In addition to financing traditional licensed communications concerns, we have financed other companies such as BET, Emerge Magazine and the list goes on and on and on.

In cellular, we recently sold our cellular company Radiophone Corporation to TDS in a stock-for-stock merger and that occurred roughly a year ago this May. We originally participated in the initial cellular licensing process. When the cellular industry began, we formed a company called Stellar. Stellar had as its initial investors North Carolina Mutual Insurance Company, Percy Sutton, Reagan Henry, and a host of other minorities.

We ended up as a participant through that company owning 29 percent with our group, which was a joint venture with Rapid American and Western Union, 29 percent of Detroit Cellular Telephone Company, which was sold in 1987 to Pacific Telisis. So, we have had a long experience in financing communications concerns owned by minorities.

Of the 77 or so FM stations and 120-odd AM radio stations which are black owned, we have probably financed a little over a third of those. We have investments in, you are probably familiar if you listen to the radio here in Washington with magic, WMMJ, if you are in Baltimore, WWIN and WERQ, if you are in L.A. you listen to La Maquina, which is a new FM station KMQA, Spanish language, we helped finance that station on the air last October, also along with stations in Houston.

Nevertheless, we have done this with very little capital and a tremendous amount of talent. What the minority community possesses in this country, both black and Hispanic, is a phenomenal amount of really well-trained, highly motivated talent. Capital is not always essential when you have that kind of talent. That has been our experience.

But what you do need is opportunity, and without opportunity talent can't be employed and no amount of capital is adequate to support a desire if you don't have the opportunity to involve yourself in business development. We believe that blacks and other minorities have been intentionally excluded from participation in the PCS/PCN auction.

We believe that because the telephone companies have found themselves in the position where their twisted pair plant is obsolete, and they realize if they don't move into either broadband wired service and/or into PCS/PCN, they will be out of business, that the commission and the Congress have committed pretty much to support the continuation of the RBOCs goals to be telephone companies.

If you read the newspapers regularly, you will almost certainly see on a daily basis stories of cable companies offering bypass service in their communities for people who want to hook into the Internet system. The reason why you don't hear the phone company offering that same service is because the phone company already does, and if you use the phone company to interact with Internet, what you found is that your ability to interact is slowed by the technical limitations of the existing telephone system.

On the other hand, when a cable company hooks you in using co-ax cable, you have the full broadband capability and technical capacity to interact almost on a real time basis with the Internet system. That is the dilemma of the phone company and that is what I believe the FCC and Congress are protecting in setting up the auction process which essentially excludes everybody except the

phone companies and other large communications concerns from participation.

Some minor modification in the structure for the auction would have allowed minorities to participate. The commission stresses strenuously that it shouldn't have preferences, that preferences are somehow unAmerican.

Well, I can tell you, I have been around this business long enough to have seen the very same telephone companies when the commission structured the cellular process so that the phone companies were awarded in every market, they were guaranteed a license on a preference basis, and that license today is called a wire line license. If you look at cellular, you have two licenses in every market, one is the nonwire line, the other is the wire line.

When those administrative licensing hearings were held to award those licenses to cellular applicants, the phone companies participated in the wire line hearings and everybody else in the world participated in the nonwire line hearings. Today the phone companies still have a preference because what the commission has done is that it has aggregated its spectrum into 30 megahertz blocks into MTAs and BTAs, which are huge geographic areas. They set up a bidding process which requires a front end loading. That is, you have to pay your money to get in.

Because most people don't have the kind of money that it takes, only the phone companies, as you have pointed out with their financial resources and large cash flows, they are the only ones that can effectively participate in this auction process. Everybody else has been excluded, and they have been awarded a preference on the basis of their balance sheets.

So, that a preference system still exists. It is just not called preference. For everybody else we are denied the opportunity to effectively participate and compete. Some might say, well, that is the nature of things. It is not the nature of things.

What will happen is that the auction will start in June, unless the entrepreneurs in this country scream bloody murder that it shouldn't happen. With the spectrum that is going to be awarded essentially locking in place a trillion dollars. It was stated here today, not by me, but by the Chairman of the FCC this morning, that a trillion dollars of revenue over the next 10 to 20 years will go yearly to those who own the PCS spectrum. What, in effect, is happening is minorities are being excluded because we don't have the ability financially to participate in the auction for this tremendous revenue stream.

Let me just say something about cable. We had the same argument about preferences, which were deemed necessary in cable franchising to insure minority involvement and service to minority communities within a reasonable period of time.

Chairman MFUME. Let me ask that you say it quickly. Those bells indicate there is another vote on the floor. We are going to have to conclude shortly to be there for that, so if you would sort of conclude and summarize, I have a couple of questions for all of you.

Mr. WILKINS. OK. I will conclude by just saying that this same debate raged on with cable in the major cities. The debate was about how and when inner city residents would get cable service.

The shame of it all is that on this very day in the city of New York in the south Bronx, half of the south Bronx remains uncabled, a largely minority area almost two-thirds of Brooklyn, New York is uncabled. These are all black and Hispanic areas, they remain uncabled.

South central Los Angeles was just cabled 2 years ago. I contend that these areas would have cable service now if minority entrepreneurs had received the franchises to service these areas. Minority areas will be treated exactly the same way in the delivery of PCS/PCN services as they have been treated with respect to the development of cable. Unless minorities are allowed to participate in the development of this critical service through set-asides and direct ownership.

Thank you.

[Mr. Wilkins' statement may be found in the appendix.]

Chairman MFUME. Thank you very much, Mr. Wilkins, Ms. Brown and Mr. Bates. A couple quick questions.

I apologize for the time constraints. We normally are not in session on Fridays, at least in a voting session. This happens to be one of those rare cases that we are. Following this session there is a minority business brain trust, quarterly brain trust summit that will be occurring, and that is another one of the things that we are competing with today.

Ms. Brown, on page 11 of your written statement you suggested that the designated entities pass a disadvantage test for eligibility.

Can you tell me for the record how you envision that test occurring?

Ms. BROWN. Yes, Mr. Chairman. Our concern here is that the FCC does careful screening of eligible designated entities in order that truly designated entities get the preferences. We have looked around to other programs and other Federal agencies, and the SBA 8(a) program is one that is of interest.

It has been on the books for quite a while, and it establishes "disadvantaged" as a category, and it does that by looking at both social disadvantage and then at economic disadvantage, and the key is that in our minds these preferences are to be for entities and for folks who have not accumulated massive amounts of wealth, but could qualify under some of the other groups that are enumerated. What the section 8(a) program does is it essentially says that these particular preferences are not available to people who have acquired enormous amounts of wealth, and it is a program that has been existing for quite some time.

Chairman MFUME. There has been a lot of controversy over this term "disadvantaged", and you may remember the report of the commission a year or so ago that said maybe because of semantics we are setting up businesses to be in a precarious situation that they have nothing to do with and that perhaps we ought to use the term historically underutilized.

You used "disadvantaged", so I am going to ask you to respond to that. Do you think that makes sense at all in future language?

Ms. BROWN. I think "underutilized" or "underrepresented".

Chairman MFUME. "Historically underutilized."

Ms. BROWN. "Historically underutilized" or "underrepresented" is really the crux of what we are going after, but since this 8(a) regulation uses this term "disadvantaged", that is why we are using it.

Chairman MFUME. Mr. Bates, the FCC has issued rules for narrowband PCS which offer the same preferences to minority-owned businesses as they do for women-owned businesses. Given the data and the research that you were enunciating a little while ago, do you believe that these two groups, for the record, confront similar obstacles in terms of securing capital and credit?

Mr. BATES. I do not. In terms of the same Census Bureau databases that produced the loan figures that I cited during my testimony, the same disadvantage would not characterize women-owned business. In terms of loan dollars received per dollar of equity investment, the same disadvantage does not characterize women-owned business.

Chairman MFUME. Do you think it might be wise, then, to go back and revisit that formula and perhaps weight it in such a way that reflects the reality of the weighting in society with respect to the ability of both minority-owned and women-owned businesses to secure capital?

Mr. BATES. Absolutely. In terms of the stringency of the capital barrier, the situation simply is not the same for minority and women-owned businesses, and it is inaccurate to assume that the same barrier applies to both groups.

Chairman MFUME. Because it is assumed, is it also fair, then, for you to draw as a conclusion the fact that perhaps minority businesses which were referred to earlier as disadvantaged become even more disadvantaged under that kind of formula?

Mr. BATES. I think we have seen it happen in a number of cities and States wherein preferential procurement programs, women and minority businesses have been treated as one homogeneous category and the experience has very frequently been that the women-owned businesses take the bulk of the procurement over time and minority contractors lose out.

Chairman MFUME. Mr. Wilkins, could you also for the record give us your views on the preferences that were adopted by the FCC for the narrowband in terms of getting PCS licenses?

Mr. WILKINS. I think that the preferences will be helpful. I think that the preferences themselves should be restricted, as has been suggested, solely to minority concerns or those that have been historically underutilized. I don't think that it should be a wide open preference allotment. There will be a number of companies that will take advantage of that because it is wide open.

Chairman MFUME. Mr. Kennard, could I get you to come to the table for just a moment?

Mr. Wilkins, would you also for the record submit a detailed set of testimony with regard to the model you alluded to before about telephone companies and what could have been construed then clearly as a set-aside and perhaps show how that juxtaposed against the reality and the debate in the current discussion over PCSs could in fact give us reason to pause and maybe reconsider our approach to this?

I would like to make that available for this record because again the Chairman, Mr. Hundt, said earlier that this record would be

very instructive in terms of the deliberations of the commission, and I know we were under a time constraint, but I found that to be interesting.

Mr. WILKINS. Yes.

[The information may be found in the appendix.]

Chairman MFUME. Mr. Kennard, if the FCC is concerned, as I understand it is, that set-asides would be constitutionally challenged, could you tell the subcommittee why you continue to consider them in reality if they do not appear to be a viable option as has been discussed earlier.

Mr. KENNARD. Well, Mr. Chairman, I don't think it would be accurate to say that set-asides are not a viable option. They are very much on the table for discussion at the FCC.

In fact, the option to use set-asides was unanimously adopted by the commission in March. I think that Larry Irving really gave a very astute assessment of the legal and policy conundrum that the commission finds itself in right now. I think that if called upon I think I could write a very compelling brief in favor of set-asides, the constitutionality of set-asides, but—

Chairman MFUME. Could you share that in concept with Mr. Irving, then?

Mr. KENNARD. I certainly could, but if I could just complete the statement.

I think I could write a very compelling brief, but I also think that it would not be prudent for anyone not to recognize that set-asides have a marginally greater risk legally.

Let's be frank here, though, anything we do in terms of a race-based preference has judicial risks. If we didn't acknowledge—if we were afraid of those risks, we wouldn't do anything.

All I am saying is that there is a spectrum of risk that you have to take into account. Speaking personally, because I will not be voting on this matter before the commission, I think that Congress gave us the flexibility to adopt a whole range of preferences. In fact, in the Omnibus Budget Act, Congress told the commission that you should adopt different techniques and try different things to see what works.

Ultimately, I think it makes sense if we are to hedge our bets legally, constitutionally, perhaps adopt an array of preferences. Everything on the table is useful and meaningful, installment payments, tax certificates, bidding preferences and set-asides. The question is how do you strike the appropriate balance, both in balancing the legal risk and also doing something that will create meaningful opportunity?

We have been talking to many, many entrepreneurs who want to get into the PCS business, and none of them are unanimous whether supporting set-asides, bidding credits, installment payments, et cetera, so somewhere in there there is an appropriate mix. We just have to find the right balance.

Chairman MFUME. But they all would agree or I think should agree, if I am following your thinking, if you use all of those and one is struck down, it does not then disadvantage the ability of you to do what you set out to do in the first place if you have an array of different preferences in place.

Mr. KENNARD. Yes, obviously that would depend on how broadly a court decided to act in striking down one or more of the preferences, but logic would dictate that if you want to hedge your bets and come up with a fairly creative program that will accomplish those ends, you want to try as many different things as you can and have maximum flexibility.

Chairman MFUME. Have you shared that with Chairman Hundt?

Mr. KENNARD. Yes, I have, and he is aware of it and I think he agrees with this approach. That is why I think he testified that all of these are very much on the table. Set-asides have not been categorically rejected as a model for us to use.

Chairman MFUME. OK. I am told that I have got about a minute left on the vote, and as such unfortunately we are going to have to bring to a conclusion this hearing.

The legislative record is open for 15 days, so there will be additional questions that will be submitted probably to most of you, certainly to the Chairman, as I indicated earlier, that we would like to get a reply to so that we could have one conclusive record that will be instructive not only for the commission but for others.

I would like to also announce that the minority business summit scheduled for 12 o'clock noon will begin at 12:30, and to ask those participants who are here to bear with us. We regret the delay. The fact of the matter is though, that the House is in session. We will be convening that brain trust in this room.

My thanks to all of you. This hearing is officially adjourned.

[Whereupon, at 12:13 p.m., the subcommittee was adjourned, subject to the call of the chair.]

APPENDIX

Statement of
The Honorable Kweisi Mfume
Chairman

Subcommittee on Minority Enterprise
Finance and Urban Development

Hearing on

"Discrimination In the Telecommunications Industry"

The Subcommittee will come to order. Members of the Subcommittee, distinguished guests, ladies and gentlemen. I am pleased to welcome you to today's hearing of the Small Business Subcommittee on Minority Enterprise, Finance and Urban Development, on the topic, "Discrimination In the Telecommunications Industry". By making development of a National Information Infrastructure a principal element of its high technology/economic development policy, the Clinton-Gore Administration has focused much attention on the potential for broad application of advanced information technology and telecommunications resources to social needs and economic development.

The term "Information Superhighway" has become virtually synonymous with the evolution in the telecommunication infrastructure that will link homes, businesses, government, hospitals, and education to each other and to a vast array of electronic information resources through Personal Communications Services or PCS.

One writer suggested that the information superhighway could affect American life as profoundly as railroads, interstate highways, telephones, and television. Another wrote that the information superhighway is bigger than the industrial revolution, more important than the urbanization of America and more sweeping than the development of the microprocessor. I choose to call it potentially one of the greatest business opportunities for small and minority entrepreneurs in our lifetime. The one caveat is that access to this opportunity is contingent upon how the Federal Communications Commission (FCC) adapts its regulatory scheme to lower the significant barriers to entry in this lucrative field.

Over the past several years, the House Energy and Commerce, Subcommittee on Telecommunications and Finance, Chaired by the Honorable Edward J. Markey (D-MA), has explored the critical and diverse issues involved in developing a comprehensive telecommunications policy for this country. Resolving those issues, according to Chairman Markey, is of major concern to his Subcommittee because, "the goal of a seamless, open, and flexible information highway depends, in part, on knowing who owns the roads and understanding what the rules are for getting on and off." Let me state that those broader issues are best left to that Committee and are beyond the narrow focus of today's hearing.

One might ask then, why a Small Business Subcommittee is interested in issues traditionally associated with another Committee's province. The answer is found in statutory language contained in Title VI of the Omnibus Budget Reconciliation Act of 1993, which grants the FCC authority to use competitive bidding procedures to award licenses for use of radio spectrum.

Among the goals of promoting new technologies, and efficiently utilizing the spectrum for the public benefit, Congress directed the FCC to promote economic opportunity and competition by "disseminating licenses among a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by members of minority groups and women", collectively referred to as "designated entities".

In prescribing regulations pursuant to this mandate, Congress charged the Commission with "ensuring" that these designated entities are "given the opportunity to participate in the provision of spectrum-based services". This language not only invokes the oversight jurisdiction of this Subcommittee, but the limited nature of this precious resource called radio frequency spectrum, the current congested state of the spectrum, and the high demand by the private sector, makes the specific methodology chosen by the FCC to ensure designated entity participation critical.

It has been well-documented that Hispanics, African-Americans and Asians have been historically under-represented in broadcast communications. The lack of minority participation in emerging telecommunications technologies, however, has only been recognized in recent years. Findings of the FCC Small Business Advisory Committee (SBAC), published last year, put the current issues that confront the designated entities in perspective.

In sum, the SBAC found that barriers to full participation by small, minority and women-owned businesses in existing telecommunications markets are exacerbated by the lack of capital, concentration of ownership, and the unique problems associated with racial and gender bias.

Today, we have an opportunity to hear from a broad range of parties interested in the accelerated development of a regulatory framework, that will govern an information infrastructure capable of supporting a wide range of interactive personal communication services.

The interests of the members of our several panels range from a respected Member of Congress, who has labored on these issues over the years to ensure that adequate consumer and competitive safeguards are in place, the Chairman of the Commission charged with crafting rules which combines industry and public policy goals, a venture capital firm specializing in information

technology, and a service provider interested in the opportunities which promise to revolutionize the way we live.

With regard to the Commission, let me state for the record that this hearing is not an attempt by this Subcommittee to determine in advance future rule making by the FCC on emerging technologies. We do, however, hope to highlight some of the historical impediments to minority-owned businesses entering the telecommunications industry, and encourage the FCC to adapt its regulatory scheme to recognize and counterbalance the entry barriers in PCS and other emerging technologies.

Opening Statement of Congressman Cleo Fields

Mr. Chairman, Thank you for your continued efforts on behalf of the small and minority-owned businesses of this country. Today's hearing is important to myself and many others interested in why minority-owned businesses are so under-represented in the telecommunications industry, and will lead the important effort to insure the exciting emerging fields of telecommunications will be structured with a level-playing field where small and minority-owned businesses can compete.

After so many years of segregation and exclusion, few efforts are as important as strong, affirmative policies to nurture minority-owned businesses. Economic exclusion remains a persistent barrier to the integration and advancement of minorities. Until minorities have equal opportunities in business, we as a society will not achieve meaningful integration.

We have made progress on a number of fronts in the effort to improve minority business opportunities: businesses across the nation are taking affirmative steps to bring minorities into the management ranks, federal agencies have procurement goals for minority-owned businesses, and the SBA assists minority businesses in obtaining capital. But these efforts are not enough, as is evidenced by the continued difficulties and obstacles that face minority-owned businesses.

We must continue to urge our society towards meaningful integration; to level the economic playing field. Our task as lawmakers is to identify those unfair obstacles confronting businesses, and remedy them.

Today's hearing recognizes and is in response to a problem which is no mystery to minority businesses: the unavailability of capital, especially venture capital, is a significant bias against minority businesses. This bias in the supply of venture capital hits minority-owned businesses particularly hard in new industries that have high start-up costs. In such industries, our commitment to fair business opportunities requires that we take affirmative efforts to insure minority businesses are represented.

The telecommunications industry seems to be no exception. In fact, the need for affirmative efforts on behalf of minority businesses is especially great given the large licensing fees proposed and the significant cost of high-technology equipment required.

Special efforts to insure opportunities for minority firms are clearly needed, so the question then becomes how to best achieve this end.

For the agencies managing the contract and auction process, many options are available to achieve the minority-business assistance desired. The options vary in potency from merely insuring minority-owned firms among the qualified applicants, all the way to setting aside a portion of the spectrum to be auctioned. Each of the many mechanisms available varies in the degree of preference provided to minority owned business, and each of which has advantages and disadvantages.

Most important point is that there is good evidence on the efficacy of the different minority-preference mechanisms from the results of the many instances where they have been used. Even though not used in this specific context, the variety of measures have predictable outcomes. In other words, I believe that it is known, by and large, how the different preference mechanisms will work -- previous experience can instruct us whether a certain preference mechanism will indeed achieve the goal.

Consequently, I believe that the choice of mechanism to use indicates what result is desired. If it is truly wanted to include competitive minority-owned businesses in the final outcome, and to support minority-owned businesses in emerging telecommunications industries, then the agency involved should choose that mechanism which we know will yield that result.

*Access to Credit and Capital Among
Minority-Owned Businesses**

by

*Dr. Timothy Bates, visiting fellow
The Woodrow Wilson Center*

May 20, 1994

**Testimony prepared for the U.S. House of Representatives Committee on Small Business,
Subcommittee on Minority Enterprise, Finance, and Urban Development.*

*Research reported in this testimony was conducted on-site at the Center for Economic Studies,
U.S. Bureau of the Census. Conclusions expressed are the author's and do not necessarily reflect
the views of the Census Bureau.*

Testimony of Dr. Timothy Bates before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development

Topic: Access to credit and capital among minority-owned businesses.

A. Envision two entrepreneurs starting small businesses:

1. Both are college graduates;
2. Both are 40 year old males;
3. Both have 18 years of managerial work experience;
4. Both are investing \$30,000 of their own personal funds (equity capital) into their business startup;
5. One is African American, the other is white.

Do these two entrepreneurs have equal access to loan funds from financial institutions?

No - not even close. My examination of 2,133 actual bank loan recipients (1419 white, 714 black) shows that, controlling for education, work experience, age, gender, and other factors, bank loan dollars, per dollar of owner equity investment, are:

White firms: \$ 1.85

Black firms: \$ 1.16

B. Loan Access

Table one summarizes nationwide data comparing debt financing used by African American and white owners creating small businesses. At startup, the average white-owned firm has more than twice as much financial capital (\$70,756 among those using debt financing) as

Table One: Financial Capital, Debt Capital, and Loan Incidence Among Young Firms, by Owner Race

	<u>Borrowers Only</u>		<u>Nonborrowers Only</u>	
	<i>Black firms</i>	<i>White firms</i>	<i>Black firms</i>	<i>White firms</i>
<i>Total financial capital (mean)</i>	\$32,813	\$70,756	\$8,545	\$22,692
<i>Debt capital (mean)</i>	\$22,079	\$48,684	-	-
<i>Percent receiving bank loans</i>	55.6%	64.6%	-	-

Source: U.S. Bureau of the Census Characteristics of Business Owners Data Base

the average black business (\$32,813). Financial institutions are the largest source of debt capital for these firms: among the startups utilizing debt, 64.6 percent of the white firms and 55.6 percent of the black firms borrowed from banks (table one). Many of these loans are not formal business loans, which are not attainable for many business startups. Other common types of bank loans that are widely used are 1) personal loans, 2) home equity loans, 3) overdraft accounts, and 4) credit cards. These various bank loans provide more loan dollars to small business startups than all other sources combined. Table two extracts the bank loan recipients only from table one's data. Note that among bank loan recipients starting small businesses, average loan sizes are:

White firms: \$55,803

Black firms: \$25,704

African American firms are much more likely to utilize personal loans, overdraft accounts, and credit card balances to finance business entry. Percentages of bank loan recipients borrowing less than \$5,000 are:

White firms: 24.6%

Black firms: 43.1%

Thus, black business borrowers more often use sources of consumer credit - smaller, generally more expensive loans - while whites use business loans more frequently to finance small business creation.

C. Why are Black Business Borrowers Coming Up Short?

There are three main reasons; the average African American starting a business, relative to white owners:

Table Two: Financial Capital Structure of Borrowers

Bank Loan Recipients Only

	<i>Black Firms</i>	<i>White Firms</i>
<i>Total financial capital at time of entry</i>		
<i>Mean</i>	\$36,530	\$76,318
<i>Percent under \$10,000</i>	47.2%	27.7%
<i>Equity</i>		
<i>Mean</i>	\$10,826	\$20,514
<i>Percent under \$5,000</i>	66.1%	52.8%
<i>Debt</i>		
<i>Mean</i>	\$25,704	\$55,803
<i>Percent under \$5,000</i>	43.1%	24.6%

Source: U.S. Bureau of the Census Characteristics of Business Owners Data Base

- 1) has less equity to invest;
- 2) receives fewer loan dollars per dollar of equity investment;
- 3) is less likely to have affluent family members or friends that provide alternative loan sources.

Thus, the problem of low equity, which is rooted in low household wealth accumulation, is exacerbated by limited ability to leverage what equity the African American owner brings to the table.

Household wealth is a very important source of funds for starting small businesses. In terms of marketable household wealth holdings - financial assets, real estate, and the like - my studies reveal that 4.2 percent of black households and 22.1 percent of white households have net assets exceeding \$100,000. Median marketable wealth among black households is \$5107, versus \$37,999 among whites. Having less equity to leverage makes bank credit less accessible. Furthermore, family and friends are the second and third largest debt sources for small businesses. Paucity of wealth makes family and friends a weaker debt source for blacks than for whites. Lower black household wealth holdings are rooted in both lower incomes and general lack of intergenerational wealth.

D. What Can be Done?

In summary, all three major debt sources - financial institutions, family, and friends - provide more credit to white than to black business owners. Problems of lower incomes and intergenerational wealth cannot be altered quickly. The inferior treatment accorded black entrepreneurs by commercial banks can be acted upon. Studies of financial institution lending discrimination invariably focus upon housing finance. The rich small business data resources

described in this report have been available at the Census Bureau since 1988. I am the only person in the country who has analyzed these data extensively: no person from the FDIC, the Fed, or the Comptroller's office has taken the time to study bank treatment of minority-owned business comprehensively. A first step is to call attention to the problem and to pressure the bank regulatory agencies to pay more attention to bank treatment of minority entrepreneurs.

E. Other observations

- 1. Are all minority groups equally effected by capital asset problems? No. Asian-Americans are, on average, better educated, wealthier, and higher income than whites. Their business financing problems are altogether different.*
- 2. What kinds of industries are minorities most likely to be shut out of by capital constraints? Capital intensive ones, of course. Manufacturing is the most capital intensive major line of small business: African American representation in manufacturing ownership is much lower than in other fields, Their representation in communications is so low that I could not even generate meaningful summary statistics on minority underrepresentation. Minority representation in capital-intensive emerging industries, in the absence of specific government intervention, is going to be high only among Asian Americans. Minorities generally and African Americans specifically are largely shut out by financial capital barriers, which force them to favor self-employment in less capital intensive service industries.*

TESTIMONY OF MARGARET BROWN
SENIOR VICE PRESIDENT,
COOK INLET REGION, INC.

BEFORE THE SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE AND URBAN DEVELOPMENT

May 20, 1994

Mr. Chairman and Members of the Subcommittee, thank you for inviting our testimony today.

My name is Margaret Brown, and I am Senior Vice President of Cook Inlet Region, Inc. ("CIRI"). I am a shareholder and I am of Yupik Eskimo descent. I was born in Takotna, a tiny village in the interior of Alaska near the Kuskokwim River. On behalf of our 6,700 shareholders, I am honored to present to you our views on the minority preference programs to be administered by the Federal Communications Commission ("FCC" or "Commission") as it awards telecommunications licenses through competitive bidding.

In my testimony today I will describe CIRI and its shareholders, the promise of the telecommunications industry, and why the minority preferences recently mandated by Congress are vital to ensure that businesses owned by minorities and women

have an opportunity to participate in the provision of spectrum-based services.

I. CIRI and its Shareholders

As you may be aware, CIRI is one of the thirteen regional Alaska Native corporations established by Congress under the terms of the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). As Alaska entered the 1970s, Alaska Natives continued to suffer the grave social and economic hardships resulting from the disruption of their culture and lifestyle that began with the arrival of Russian fur traders 200 years earlier. At the same time, Alaska Natives demonstrated their legitimate claim to land in Alaska. Congress passed ANCSA to address these realities.

The terms of ANCSA represent a novel approach to U.S.-Native American relations. Rather than form a system of reservations, Congress directed that thirteen regional Alaska Native corporations be established, that Alaska Natives be enrolled to these corporations, and that the corporations issue to its members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status. They became the owners of corporations which, at the direction of Congress, hold the collective results

of their settlements with the federal government.¹ In turn, the corporations are assigned the challenge of earning profits for those shareholders and attending to the shareholders' real social and economic needs.

No one recognizes the complexity of that task more than the governing boards of directors and managers of these hybrid corporations. The simple act of bestowing shareholder status on Alaska Natives has not eliminated the host of socioeconomic disadvantages that are due in large measure to the effects of two centuries of past discrimination against Alaska Native people. According to a 1993 report by the United States Department of Commerce, only 58 percent of Alaska Native families consist of a husband and wife, compared with 80 percent of all families in Alaska. Indeed, the proportion of families with a female householder and no husband present was twice as high among Alaska Natives as among Alaska's total population. Bureau of the Census, United States Department of Commerce, We the First Americans 15-17 (1993) (the figures in the report are based on the 1990 Census of Population and Housing).

Moreover, only 4 percent of Alaska Natives receive Bachelor's degrees, compared with 23 percent statewide, and only

¹ Thus, while regional Alaska Native corporations might have significant aggregate capital resources, their resources actually are quite small when viewed per shareholder.

63 percent of Alaska Natives over the age of twenty-five have completed high school while the statewide total is 87 percent. Just 56 percent of Alaska Natives are in the State labor force and the median income in 1989 for Alaska Natives was 43 percent lower than the median income for the State as a whole. Twenty-three percent of all Alaska Natives live below the poverty line.²

Unfortunately, CIRI's Alaska Native shareholders can be described with these statistics. As part of its duty to serve its shareholders, CIRI — through a network of sister organizations — conducts a number of programs that provide scholarships and training, medical and dental services, and means to preserve Alaska Native culture and history.

While these initiatives are important, CIRI recognizes that generating profits for distribution to its shareholders is its paramount mission. To fulfill its mandate to provide for its Alaska Native shareholders, CIRI distributes one third of its net profits to shareholders for income maintenance. According to a recent survey of CIRI shareholders, 38 percent of CIRI shareholders have an annual family income that is less than \$15,000 per year. It is not surprising, then, that 71 percent of

² CIRI included the studies setting forth these and other statistics about Alaska Natives in a submission to the FCC in connection with the Commission's PCS Roundtable held in April. See FCC to Host Panel Discussions on PCS Issues April 11-12, Mimeo No. 42480 (rel. April 4, 1994).

shareholders spend their CIRI dividends on food, clothing, and shelter.

II. CIRI and Telecommunications

Cognizant of its special status, the nature of its shareholder base, and the broad mission bestowed by Congress, CIRI has moved to diversify its business interests. To minimize the risk to its shareholders, CIRI must preserve its precious capital resources by approaching business opportunities with a long-term view. CIRI cannot afford to enter "bet-the-company" deals. There is simply too much at stake.

To broaden the economic base from which it serves these shareholders, CIRI has begun to explore new frontiers in the telecommunications field. Having invested in several television and radio broadcasting facilities, CIRI appreciates the tremendous growth potential that telecommunications services provide. The potential for economic expansion in the non-broadcast telecommunications fields is especially great. CIRI sees the provision of these telecommunications services as a central facet of the company's strategy for growth.

However, finding a place on the national information superhighway can be very difficult — particularly for minority enterprises like CIRI. Telecommunications operations are highly

capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult. Those providers frequently have markedly greater resources than less established enterprises and they are able to link those resources with their industry expertise to dominate a particular market or service. That dominance is likely to continue with the advent of competitive bidding for telecommunications licenses. For this reason, it is critical that minority enterprises be given an opportunity to enter markets for emerging services at the ground level.

Congress recognized this reality in August when — as part of the Omnibus Budget Reconciliation Act of 1993 — it directed the FCC to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women (collectively "Designated Entities") are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. Indeed, Congress dictated that these designated entities are to be given enhanced opportunities to offer spectrum-based services.³ CIRI applauds Congress' effort

³ New Section 309(j)(3)(B) of the Communications Act of 1934 directs the Commission to "promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." Similarly, Section 309(j)(4)(C) requires the Commission, in promulgating its regulations, to "prescribe area designations and bandwidth assignments that

to see that the emerging national information superhighway is open to all, and CIRI urges this Subcommittee to ensure that the congressional directive to afford designated entities the opportunity to participate in the provision of spectrum-based services is fulfilled.

III. The FCC Should Further Tailor Competitive Bidding Preferences by Limiting Them to Disadvantaged Entities

Consistent with its interest in seeing that designated entities are afforded the opportunity to participate in the provision of spectrum-based services, CIRI believes that the FCC should approach the issue of preferential measures with caution. At the threshold, the FCC's approach to designated entities set forth in the Commission's Second Report and Order⁴ is too broad. As CIRI noted in its Reply Comments to the FCC, the FCC should supplement its existing eligibility requirements by limiting

promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Most significantly, Section 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services" Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993) ("Budget Act").

⁴ Implementation of Section 309(j) of the Communications Act Competitive Bidding, Second Report and Order, FCC 94-61 (rel. April 20, 1994) ("Second Report and Order").

preferential measures to businesses owned by those who are disadvantaged.

When Congress declared that small businesses and businesses owned by minorities and women should be assured meaningful participation in spectrum-based services, its goal was to ensure the participation of groups that are disadvantaged by the presence of unique barriers to their participation in the telecommunications industry. Those barriers, often with roots in racial and gender discrimination, are based principally on a lack of access to financing and are manifested in the vast underrepresentation of those designated entities in the industry.

Indeed, these circumstances are detailed in the September, 1993 Report of the FCC Small Business Advisory Committee ("SBAC"),⁵ where the SBAC explains that each of the designated groups faces different but equally imposing barriers to entry into the telecommunications industry. See id. at 1-5. At bottom, then, it is the fact of disadvantage that unites these otherwise dissimilar groups, and it was the goal of Congress to see that disadvantaged entities find a place on the national information superhighway.

⁵ Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314 (Sept. 15, 1993) ("SBAC Report").

However, the approach detailed by the FCC in its Second Report and Order goes well beyond this intent. For example, the current approach would allow two of the largest media companies in the nation — with assets valued in billions of dollars — to be awarded special preferences at auction simply because they are owned and controlled by women.⁶ Do these companies require special assistance? Was that within the intent of Congress?

Whether a statute or administrative provision is overbroad is a complex question under prevailing constitutional jurisprudence and one that CIRI does not attempt to answer today. However, CIRI has one practical observation. In creating a preference program that applies roughly to 60 percent of the population, the FCC has failed to narrowly tailor the benefits of the program to avoid substantial and prolonged constitutional litigation. The intervening litigation will arrest the designated entity preference program and might well delay the introduction of competitive bidding generally. In that event, the benefits of an opportunity to participate in the provision of spectrum-based services will unnecessarily be delayed to people like CIRI's shareholders.

⁶ See Second Report and Order, at ¶ 277 (defining a woman-owned corporation as one in which a woman holds at least 50.1 percent equity and a 50.1 percent controlling interest).

In its Reply Comments to the Commission, CIRI proposed a solution that goes to the heart of congressional intent. The FCC should adopt preferences to benefit those groups that are disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under this system a preference would not be given solely on the basis of race or gender, nor would it be given solely on the basis of size. Rather, a preference would be given to an entity that could demonstrate that it was disadvantaged. In that way, the grant of a preference would comport with the intent of Congress while limiting the availability of Commission assistance to those entities that truly need an enhanced opportunity to participate in the provision of spectrum-based services.

Specifically, CIRI has urged the FCC to employ the standards already established by the SBA for determining whether a business is "disadvantaged" for the purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, otherwise known as the "8(a)" program. These existing disadvantage standards would be particularly useful to the Commission in establishing a preference system geared to the disadvantaged nature of the particular business entity, not simply to the size of the entity. The standards are set forth at 13 C.F.R. §§ 124.105 & 124.106 (1993). I have included with this

testimony as Appendix A the text of the SBA standards tailored for use by the FCC in competitive bidding.⁷

IV. Designated Entities that Pass the "Disadvantaged" Test Must Be Eligible for All of the Preferences Enumerated by Congress

The preferences mandated by Congress are vital to ensure that businesses owned by disadvantaged minorities and women have an opportunity to participate in the provision of spectrum-based services. As I have noted above, telecommunications operations are highly capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult. Those providers are able to link their extensive resources with industry expertise to dominate a particular market or service. For this reason, it is crucial that each of the preferences enumerated by Congress is available for Congress' intended beneficiaries.

Congress directed the FCC to consider bidding credits and tax certificates to assist designated entities in winning licenses at auction and acquiring licenses on the open market, and alternative payment schedules — including installment payments — to assist designated entities in paying for licenses won at auction. Each of these preferences is designed to avoid

⁷ Appendix A includes (1) the regulations proposed by CIRI for use by the FCC, and (2) a marked-up version showing how those proposed regulations differ from the current SBA regulations.

an excessive concentration of licenses in the hands of existing telecommunications providers by enhancing the ability of designated entities to compete at different stages of the licensing process. The FCC should not curtail that advantage by limiting the scope of the preferences that it adopts.

For example, the FCC recently adopted designated entity preference rules to be applied in competitive bidding for narrowband personal communications services. Implementation of Section 309(j) of the Communications Act Competitive Bidding, Third Report and Order, FCC 94-98 (rel. May 10, 1994) ("Third Report and Order"). Notwithstanding the plain intent of Congress to afford preferences to each of the entities designated in the Budget Act, the Commission limited the availability of installment payment plans to small businesses bidding for small spectrum blocks. Id. at ¶¶ 86-87.

This limitation means that minority-owned businesses that lack access to capital but that cannot fit within the FCC's definition of small business will be denied access to government financing.⁸ Moreover, small businesses will be offered an

⁸ For example, Congress has expressly found that Indians such as CIRC's shareholders lack access to capital and to traditional sources of financing. See H.R. Rep. No. 907, 93d Cong., 2nd Sess., at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 2873, 2874. Nevertheless, CIRC cannot fit within the FCC's definition of small business and, therefore, cannot receive government financing.

installment payment option only when they bid on limited spectrum blocks. Given the capital-intensive nature of the telecommunications industry, this cannot have been within the intent of Congress.

Congress directed the Commission to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services by way of the preferential measures set forth in the Budget Act. A minority-owned business too large to qualify as small under the definition adopted in the Second Report and Order might well still be denied a meaningful opportunity to participate in the provision of spectrum-based services. Given the capital-intensive nature of the services subject to auction — such as personal communications services — a company with a net worth in excess of \$6 million and average net income in excess of \$2 million can very easily be foreclosed from bidding on all but the smallest spectrum blocks in the most limited markets.⁹ Indeed, the Commission acknowledges that even the Chief Counsel for the SBA views the \$6 million/\$2 million size standard as infeasible for the services at issue. Second Report and Order, at ¶ 268.

definition of small business and, therefore, cannot receive government financing.

⁹ This is particularly the case if the installment payment option is restricted to the smallest service areas.

Thus, the Commission must broaden the availability of installment payments to include all entities that are eligible for Commission preferences. Moreover, each of the preferences enumerated by Congress must be available to all eligible entities to ensure that they have the opportunity to participate meaningfully in the provision of spectrum-based services.

V. The Commission Must Establish Stringent Antisham Requirements

In the Second Report and Order the Commission adopted a limited designated entity certification requirement to be included in a prospective bidder's short-form application. Second Report and Order, at ¶ 166. That provision would require the bidder simply to affirm that it is qualified as a designated entity under the Commission's eligibility rules. As CIRI discussed in its initial Comments to the FCC, however, a much more stringent antisham requirement is needed.

The FCC has recognized that "the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides."¹⁰ An analysis of de facto control involves analysis of a number of issues including: who has the power to direct the company's operations; who determines the make-up of the board of directors;

¹⁰ Stereo Broadcasters, Inc., 55 FCC 2d 819, 821-22 (1975).

whether a large minority shareholder also holds an influential executive post — in sum, who has the right to determine the company's basic policies."¹¹

Accordingly, CIRI noted that the key to fulfilling the purpose behind the award of preferences and to deterring sham applicants is to require that minorities have actual control of the entity that is to receive a preference and that minorities hold a significant equity interest in that entity. While the Commission adopted a minority eligibility standard that reflects this principle, the Commission's short-form affirmation does not require documentation in support of an applicant's claim of preference eligibility, nor does it communicate to the applicant the gravity of the declaration being made.

In light of the complexity involved with adopting de facto control as an element of any qualification standard, CIRI has urged the Commission to require that the following elements be demonstrated and certified in a winning bidder's long-form application to qualify the bidder for the license won at auction:

¹¹ See William S. Paley, 1 FCC Rcd 1025, 1026 (1986); Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 R.R.2d 1198 (1985), appeal dismissed, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

- A. Minorities must have clear structural control over the applicant:
- in a limited partnership application, the minority must have general partner status and there must be substantial restraints on management control by any other general partner — partnership and management agreements must be filed with the application
 - in a corporate application, minorities must at least possess 50.1 percent of the voting stock — shareholder records and voting trusts or agreements must be filed with the application
 - in a consortium application, consortium agreements must be filed with the application.
- B. Certain elements in an organizational structure which call into question the minority principal's involvement in the entity will disqualify the entity. For example, if non-minorities have the ability to "call" the minimum minority equity stake within a certain period (e.g., three years) or for a fixed or below market price, the applicant should not be considered eligible for minority preferences.
- C. The Commission should make clear that if the applicant's statements are found to be false, the applicant (and its principals) will be subject to substantial penalties — both civil and criminal — as well as being disqualified from applying for any Commission license in the future. A warning such as the following (which is similar to that included in all FCC applications) should have a place of prominence in the "minority eligibility" certification block:

WILLFUL FALSE STATEMENTS OR OMISSIONS MADE IN THIS APPLICATION, INCLUDING CERTIFICATION WITH RESPECT TO THE APPLICANT'S ELIGIBILITY AS A MINORITY-CONTROLLED ENTITY, ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18 SECTION 1001), CIVIL PENALTIES (U.S. CODE TITLE 47, SECTION 503), REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(A)(1)); AND/OR DISQUALIFICATION FROM HOLDING ANY OTHER LICENSES ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION.

- D. Any attorney admitted to practice before the Commission under section 1.23 of the Commission's Rules shall be held to the standards of ethical conduct required of practitioners at the bar of any court of which he or she is a member. In principal, this means that an attorney who signs an application by a prospective minority-controlled entity certifies by his or her signature that he or she has read the application and that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the statements made in the application are well grounded in fact. Under sections 1.24 and 1.52 of its Rules, the Commission should censure, suspend, or disbar any attorney who fails to conform to this standard.

These requirements would be relatively simple to administer and would ensure that the preferences adopted to increase minority participation in telecommunications would in fact serve that purpose instead of inuring to the benefit of non-minority enterprises which purport to be eligible for minority preferences, but, in fact, are shams.

VI. Conclusion

Mr. Chairman, the number of bills currently before Congress that will impact the telecommunications industry speaks to the vitality and the promise of this field. Nevertheless, minorities are grossly underrepresented in the telecommunications industry ranks. Congress has considered the lack of opportunities for minority group members in the telecommunications field several times before, and in August the Members of Congress spoke with one voice on the need for greater opportunities in this booming industry. Congress directed the FCC to ensure that all businesses owned by minorities and women are able to share in the

benefits of a valuable national resource, the electromagnetic spectrum. Cook Inlet urges this Subcommittee to see that the congressional directive is fulfilled.

Thank you very much.

APPENDIX A

PROPOSED FCC REGULATIONS

§ 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: African Americans; Hispanic Americans; American Indians/Alaska Natives; Asian Americans/Pacific Islanders [See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC Rcd 979 (1978).]

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. The FCC will entertain any relevant evidence in assessing this element of an applicant's case. The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(i) *Education.* The FCC shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) *Employment.* The FCC shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(iii) *Business history.* The FCC shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

§ 2 Economic disadvantage.

(a) *Economically disadvantaged Individuals.* (1) Economically disadvantaged individuals are socially disadvantaged individuals or women whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage the FCC may compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(2) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals or women who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or having overcome impediments to obtaining access to financing, markets and resources.

(3) For economic disadvantage as it relates to tribally-owned concerns, see § 3(a)(2).

(b) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual or woman, the FCC will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the

financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(1) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. An individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged.

(i)(A) Except as provided in paragraph (b)(1)(i)(B) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of the FCC application will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(B) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (b)(1)(i)(A) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage. For a concern where both spouses are individuals upon whom eligibility is based, the personal net worth of each spouse individually will be considered.

(2) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, the FCC's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

(3) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, the FCC shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

§ 3 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* Indian tribes are considered socially and economically disadvantaged for purposes of participation according to the following criteria:

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 4 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* With the exception of Alaska Native Corporations (see § 3(e)(2)), the Indian tribe must demonstrate to the FCC that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process -- forms and documents required.* In order to establish tribal eligibility, the Indian tribe must submit the forms and documents required of applicants generally as well as the following material.

(i) A copy of the tribe's governing document(s) such as its constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (a)(2) of this section.

(b) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to the FCC's programs, including, but not limited to, loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(c) *Ownership.* For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

(d) *Control and management.* (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.

(e) *Individual eligibility limitation - (1) Concerns owned by Indian tribes except those owned by Alaska Native Corporations.* Requirements regarding management and daily business operations are met if a tribally-owned concern is controlled by one or more members of the economically disadvantaged Indian tribe.

(2) *Concerns owned by Alaska Native Corporations.* The Alaska Native Claims Settlement Act, as amended, provides that a concern which is majority owned by an Alaska Native Corporation shall be deemed to be controlled and managed by minority individuals and, pursuant to Pub. L. 102-415 § 10 (1992) (43 U.S.C. § 1626(e)), shall be deemed economically disadvantaged for purpose of participation in Federal programs. Therefore, the FCC will not examine the disadvantaged status of an individual involved in the management of daily business operations of an Alaska Native Corporation-owned concern.

§ 4 Definitions.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes, in the absence of proof of a minimum blood quantum, any citizen who is regarded as an Alaska Native.

Alaska Native Corporation means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, as defined in this section, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which such tribe, band, nation, group, or community resides. See, definition of "tribally-owned concern."

s **13 CFR Chapter 1 (1-1-93 Edition) PROPOSED FCC REGULATIONS**

§ 124.105 § 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 124.112(a) 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: ~~Black African Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian-Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. American Indians/Alaska Natives; Asian Americans/Pacific Islanders. [See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978).]~~

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if ~~SBA~~ the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* ~~(1)~~ An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

~~(i)(1)~~ The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

~~(i)(2)~~ The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

~~(i)(3)~~ The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

~~(v)(4)~~ The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

~~(v)(5)~~ The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA The FCC will entertain any relevant evidence in assessing this element of an applicant's case. SBA The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant:

~~(A)(i)~~ *Education.* SBA The FCC shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

~~(B)(ii)~~ *Employment.* SBA The FCC shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

~~(C)(iii)~~ *Business history.* SBA The FCC shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

~~(D) Socially disadvantaged group inclusion — (1) General. Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.~~

~~(2) Standards to be applied. In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:~~

~~(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;~~

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.

(3) Procedure. Once a notice is published under paragraph (d)(1) of this section, SBA shall adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

(4) Decision. Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (3) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the FEDERAL REGISTER. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.

§ 124.106 2 Economic disadvantage.

(a) *Economic disadvantage for the 8(a) program.* (1)(i) *For purposes of the 8(a) program, economically Economically disadvantaged Individuals. (1) Economically disadvantaged individuals are socially disadvantaged individuals or women whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall the FCC may compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.*

(ii)(2) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals or women who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or having overcome impediments to obtaining access to financing, markets and resources.

~~(iii)(3)~~ For economic disadvantage as it relates to tribally-owned concerns, see § 124.112(b)(2) 3(a)(2).

(2)(b) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual ~~or woman~~, ~~SBA~~ the FCC will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(i)(1) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. ~~Subject to the exclusion set forth in paragraph (a)(2)(i)(B) of this section, an~~ An individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry. ~~For personal net worth thresholds relating to continued 8(a) program eligibility, see § 124.111(a).~~

(A)(1)(i)(A) Except as provided in paragraph (a)(2)(A)(2) (b)(1)(i)(B) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States (e.g. ~~Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin~~) must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of the FCC application ~~to the 8(a) program~~ will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(2)(B) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (a)(2)(i)(A)(1) (b)(1)(i)(A) of this section, relating to the separate financial statements, applies only to determinations of economic

~~disadvantage for purposes of 8(a) program entry. For a concern where both spouses are individuals upon whom program eligibility is based, the personal net worth of each spouse individually will be considered for program certification and for program eligibility.~~

~~(B) Whenever SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA shall exclude the individual's ownership interest in the applicant or participating 8(a) concern and the equity in his/her primary personal residence, but shall not exclude any portion of such equity in his/her primary residence which is attributable to excessive withdrawals from the applicant or participating 8(a) concern.~~

~~(C) Whenever SBA calculates the personal net worth of an individual claiming to be an Alaska Native, as defined in § 124.100, for purposes of qualifying an individually owned 8(a) applicant concern, SBA shall include assets and income from sources other than an Alaska Native Corporation, as defined in § 124.100, and shall exclude from such calculation any of the following which the individual receives from any Alaska Native Corporation:~~

~~(1) Cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;~~

~~(2) Stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);~~

~~(3) A partnership interest;~~

~~(4) Land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and~~

~~(5) An interest in settlement trust.~~

~~(ii)(2) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, SBA's the FCC's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.~~

~~(ii)(3) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, SBA the FCC shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.~~

(b) Economic disadvantage for the 8(d) Subcontracting Program, Small Disadvantaged Business Set-Asides, Small Disadvantaged Business Evaluation Preferences and for any other Federal procurement programs requiring SBA's determination of disadvantaged status. (1) For purposes of the section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and whose diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for the section 8(d) Subcontracting program, Small Disadvantaged Business set-asides and Small Disadvantaged Business Evaluation preferences, SBA will consider the factors set forth in paragraph (a) of this section but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach corresponds to the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.

(2) An individual whose personal net worth exceeds \$750,000 as calculated pursuant to paragraph (a)(2)(i) of this section, will not be considered economically disadvantaged for purposes of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or any Federal procurement program which uses section 8(d) for its definition of economic disadvantage.

§ 124.112 3 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* Small business concerns owned by Indian tribes are eligible for participation in the section 8(a) program, provided that certain conditions are met as described below. The term "Indian tribe" is defined in § 124.100.

(2) Small business concerns owned and controlled by Indian tribes are generally considered socially and economically disadvantaged for purposes of participation according to the following criteria; in programs authorized by section 8(d) of the Small Business Act, section 1207(a) of the Defense Authorization Act of 1987 and any other program, which requires social and economic disadvantaged status as a condition of eligibility. If the disadvantaged status of a tribally owned concern is challenged under subpart B of this part, SBA will evaluate the concern's disadvantaged status using the criteria set forth in this section.

(3) Small business concerns owned and controlled by Alaska Native Corporations (ANCs) are eligible for participation in the 8(a) program, subject to the same conditions as apply to tribally owned concerns which are described at paragraphs (b) through (e)

of this section, with the following exceptions which apply solely to ANC-owned concerns:

(i) In evaluating the economic disadvantage of the ANC, no consideration shall be given to assets or income derived from distributions of the Alaska Native Fund established by the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, et seq. Such assets and income should be included and specifically identified on the ANC's financial statements.

(ii) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(iii) Even though an ANC can be either for profit or non profit, a small business concern owned and controlled by ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC for purposes of program eligibility so as to satisfy paragraph (c)(3) of this section where the majority of stock or other ownership interest is held by the ANC and holders of its settlement common stock. Both a majority of the total equity and total voting power must be so held.

(iv) Paragraphs (b)(3) and (ii) of this section are not generally applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation and by-laws. Additionally, paragraph (c)(1) of this section is not applicable to the ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a "sue and be sued" clause.

(v) The Alaska Native Claims Settlement Act provides that a concern minority owned by an ANC shall be deemed to be both owned controlled by such ANC. Therefore, an individual responsible for control and management of an ANC owned 8(a) applicant or Participant need not establish personal social and economic disadvantage.

(b) Tribal eligibility. In order to qualify a concern which it owns and controls for participation in the 8(a) program, an Indian tribe itself must meet the conditions set forth in paragraphs (b)(1) and (b)(2) of this section. Once an Indian tribe has so established its disadvantaged status, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) Program Participation, unless specifically required to do so by the AA/MSB&COD or his/her designee. The AA/MSB&COD, or designee, may require proof of tribal eligibility during the Program Participation of any tribally owned business or at any time during the processing of an 8(a) program application from a tribally owned concern. However, nothing in this paragraph affects the requirement that each tribally owned concern seeking to be certified for 8(a) Program Participation comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 124.100 4 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* ~~In order to be eligible to participate in the 8(a) Program~~ With the exception of Alaska Native Corporations (see § 3(e)(2)), the Indian tribe must demonstrate to ~~SBA~~ the FCC that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process -- forms and documents required.* ~~Except as provided in paragraph (a)(3)(iv) of this section, in~~ In order to establish tribal eligibility ~~to qualify for the 8(a) program,~~ the Indian tribe must submit the forms and documents required of ~~8(a)~~ applicants generally as well as the following material.

(i) A copy of the tribe's governing document(s) such as its constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph ~~(b)(2)(a)(2)~~ (a)(2) of this section.

~~(c) Business eligibility. In order to be eligible to participate in the 8(a) program, a concern which is owned by an eligible Indian tribe must meet the conditions set forth in paragraphs (c)(1) through (c)(6) of this section.~~

~~(1)(b)~~ (b) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized

or chartered by the tribe, or Federal or state authorities. ~~Except as provided in paragraph (a)(3)(iv) of this section, the~~ The concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to ~~SBA's~~ the FCC's programs, including, but not limited to, ~~8(a) Program Participation~~ loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

~~(2) Size. (i) A tribally owned applicant concern must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the tribe will not, in and of itself, cause affiliation with the tribe or with other entities owned by the tribe. However, affiliation with other tribally owned entities may be caused by circumstances other than common tribal ownership. (See part 121 of this title regarding affiliation.)~~

~~(ii) Except as provided in paragraph (c)(2)(iii) of this section, a tribally owned Program Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.~~

~~(iii) During its Program Term, a tribally owned Program Participant may, for up to two 8(a) contracts, be a party to a joint venture which exceeds the applicable size standard, if the joint venture is:~~

~~(A) 51 percent or more owned and controlled by the tribally owned Participant;~~

~~(B) Is located on the tribe's reservation or land owned by such tribe;~~

~~(C) Performs most of its activities on such reservation or tribally owned land; and~~

~~(D) Employs members of the tribe for at least 50 percent of its total workforce.~~

~~(3)(c) Ownership.~~ For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

~~No Indian tribe shall own more than one current or former 8(a) Program Participant having the same primary industry classification. Tribally owned Program Participants are subject to the provisions of paragraphs (g) and (h) of § 124.103 relating to ownership by nondisadvantaged individuals and non-8(a) concerns.~~

~~(4)(d) Control and management. (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe, who does not manage and control more than one other tribally-owned 8(a) Program~~

~~Participant. In addition, such manager(s) must be found to possess the requisite management or technical capabilities as determined by SBA. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.~~

~~(ii) Members of the tribal council shall not participate in the daily management or on the board of directors of any tribally-owned 8(a) concern without obtaining prior written approval for such participation from SBA.~~

~~(iii) Except as permitted by paragraph (c)(4)(i) of this section, members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.~~

~~(5) Location and economic benefit. The primary economic benefits from the concern must accrue to the tribe. A concern located on a designated Indian reservation or on tribally-owned land will be presumed to provide an economic benefit, such as employment, to the tribal community. SBA may approve a location not on tribally-owned land, if the applicant concern can demonstrate that similar economic benefits will accrue to the tribal community.~~

~~(6) Potential for success. (i) SBA will approve a tribally-owned concern, including a concern owned by an Alaska Native Corporation (ANC), for 8(a) Program participation only when it finds that:~~

~~(a) Either the applicant concern has been in business in its primary industry classification for two full years or a waiver is granted pursuant to paragraph (c)(6)(ii); and~~

~~(B) The concern meets the requirements of paragraph (c)(6)(iii) regarding potential success.~~

~~(ii) The AA/MSB&COD will waive the two-year in business requirement for a tribally-owned concern if he/she finds that the concern has a marketing and develop strategy for meeting the 8(a) program competitive business mix requirements of § 124.312 without undue dependence on one or more contracts anticipated to be awarded under 8(a) program authority.~~

~~(iii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:~~

~~(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operations of the tribally-owned concern;~~

~~(B) The financial capacity of the tribally-owned concern; and~~

(C) The concern's record of performance on any previous Federal or private sector contract in the primary industry in which the concern is seeking 8(a) certification.

(7) Other eligibility criteria. (i) A tribally owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Program Participants providing the same or similar items or services.

(ii) Applicant must meet the eligibility criteria set forth in §§ 124.108 and 124.109.

~~(H)(e) Individual eligibility limitation - (1) Concerns owned by Indian tribes except those owned by Alaska Native Corporations. The Small Business Act, as amended, provides that the 8(a) requirements regarding management and daily business operations are met if a tribally owned concern is controlled by one or more members of the economically disadvantaged Indian tribe. The statute does not require that such individual be found by SBA to be personally socially and economically disadvantaged. Therefore, SBA does not deem an individual involved in the management or daily business operations of the tribally owned concern to have used his or her individual eligibility within the meaning of § 124.108(e).~~

(2) *Concerns owned by Alaska Native Corporations.* The Alaska Native Claims Settlement Act, as amended, provides that a concern which is majority owned by an Alaska Native Corporation shall be deemed to be controlled and managed by minority individuals and, pursuant to Pub. L. No. 102-415 § 10 (1992) (43 U.S.C. § 1626(e)), shall be deemed economically disadvantaged for purpose of participation in Federal programs. Therefore, SBA the FCC will not examine the disadvantaged status of an individual involved in the management of daily business operations of an Alaska Native Corporation-owned concern, ~~and such individual will not be deemed to have used his or her individual eligibility within the meaning of § 124.108(e).~~

~~(e) Existing Section 8(a) Firms. Tribally owned concerns presently in the section 8(a) program must comply with the requirements of this section within 12 months from the effective date of these regulations. Failure to do so may result in the commencement of section 8(a) program termination proceedings.~~

§ 124.100 4 Definitions.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian, (including Tsimshian Indians not enrolled in the Metlakla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes, in the absence of proof of a minimum blood quantum, any citizen who is regarded as an Alaska Native.

Alaska Native Corporation means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, as defined in this section, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which such tribe, band, nation, group, or community resides. See, definition of "tribally-owned concern."

STATEMENT OF

REED E. HUNDT
CHAIRMAN
FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON MINORITY ENTERPRISE, FINANCE,
AND URBAN DEVELOPMENT

MAY 20, 1994

Thank you, Mr. Chairman and Members of the Subcommittee for holding this important hearing. I welcome the chance to discuss with you the need to enhance opportunities for all Americans in the communications revolution that is upon us.

We find ourselves today at a very exciting time in the history of telecommunications. New technologies are being developed at a dizzying pace, the industry is expanding dramatically on a daily basis, and our preconceived notions about the fundamental nature of the industry are being shattered. While we once thought local telephone service to be a natural monopoly, today competitors are successfully vying for business in almost all urban markets. Likewise, the cable, telephone, and information industries are converging, demonstrating how technology and competition can create economic advancement.

I believe that the right policy for nurturing this revolution is competition. I also believe that the framework principles for that competition should be choice, opportunity and fairness. This morning I'd like to focus on one of those principles: opportunity. We need to enhance opportunities for all Americans, especially small businesses, women, and minorities. I refer, of course, to the opportunity to compete in our communications revolution.

At the beginning of this decade, in recognition of the dramatic developments in telecommunications, the Commission allocated electromagnetic spectrum for emerging technologies and recently started the process of licensing that spectrum. As a

result, an abundance of new spectrum-based services, such as personal communications services (PCS), soon will be available to American consumers. PCS includes a range of wireless services that are expected to have a fundamental impact on the future development and configuration of all telecommunications networks. As we shape the regulatory environment for these new services, sound policies must be adopted to encourage growth, promote creativity, innovation and efficiency, and to ensure that no one is left behind.

Promoting meaningful opportunities for all competitors is, I think, necessary to help alleviate problems created by the history of prejudice and isolation suffered by minorities in the United States, and the second-class citizenship of women in this country. It is also necessary to foster a telecommunications infrastructure that best serves our communities and our economy.

For example, businesses owned by minority and female entrepreneurs can play an important role in providing services to certain niche markets often overlooked by larger, non-minority companies, thereby promoting our goal of universal service and economic growth. It has also been demonstrated that minority-owned companies typically hire more minority employees than other businesses, furthering the Commission's longstanding equal employment opportunity objectives.

The goal of ensuring equal opportunity in the licensing process is not new to the Commission. Citing the Kerner Commission's findings that there was a "serious racial crisis"

facing the nation, the FCC began in the late 1960s to promote nondiscriminatory employment policies by broadcast licensees.

A decade later, the Commission first addressed the serious underrepresentation of minorities among owners of broadcast stations. Recognizing that it could play an important role in alleviating this problem through the licensing process, the Commission adopted its tax certificate and distress sale policies in 1978 to encourage minority ownership of broadcast facilities. It noted that full minority participation in the ownership and management of broadcast facilities would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a scarce resource, the spectrum. These policies later were extended to cable television services.

While the Commission's policies have produced tangible results, minorities remain seriously underrepresented in ownership. One study conducted in the early 1990s showed that minorities owned only approximately 2.7 percent of broadcast properties, and that there were only seven minority-owned cable companies in the country. Given these statistics, I believe that there continues to be a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity.

It is particularly important to find innovative methods to promote access to emerging technologies. When the Commission first began to look for measures to increase minority ownership in broadcasting, the broadcast industry was mature and most of

the valuable spectrum already had been licensed. Thus, the Commission's efforts to create more diversity were severely hampered by the lack of new licensing opportunities.

In contrast, today we have a chance to have a meaningful impact on the ability of minorities and women to seize opportunities in new spectrum-based services. As part of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93), Congress gave the FCC authority to license the spectrum that the Commission has allocated for emerging technologies through a system of competitive bidding. In so doing, Congress told us to balance a number of competing objectives, including the need to develop and rapidly deploy new technologies, recover for the public a portion of the value of the spectrum, promote the efficient and intensive use of the spectrum, and disseminate licenses among a wide variety of applicants, in particular, small businesses, rural telephone companies, and businesses owned by women and minorities.

The record in the proceeding we instituted to implement OBRA 93 demonstrates that there is a distressing underrepresentation of minorities in telecommunications. For example, a recent study conducted by the U.S. Minority Business Development Agency shows that among businesses involved in telephone and radiotelephone communications, only 0.5 percent are owned by minorities. The Commission's Small Business Advisory Committee (SBAC) found that only eleven minority firms are engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging

services.

The record also demonstrates that the single greatest obstacle to entry by minorities and women is a lack of access to capital. While this is a problem for most small businesses, a number of commenters state that, because of discrimination and other factors, minorities face additional difficulties. For example, the SBAC observes that minorities frequently are denied access to traditional sources of financing and generally have to rely on family savings or friends. In addition, the SBAC notes that most radio licenses were granted at a time when there was undisguised discrimination in education, employment and capital access, thus excluding minorities from all but token representation. This trend has continued over time and minorities remain seriously underrepresented in the field of telecommunications.

In implementing the auction authority given to it by Congress, the Commission established a menu of preferences, including installment payments, spectrum set-asides, bidding credits, and tax certificates, that it could later choose from on a service-by-service basis to address these concerns. The Commission also adopted definitions of minority and female-owned businesses, small businesses and rural telephone companies (collectively "designated entities") to implement the preference program.

We required that minorities or women have at least a 50.1 percent equity ownership and a 50.1 percent controlling interest

in the designated entity. We are aware that a number of commenters have stated that the 50.1 percent equity requirement may be overly restrictive, and we are looking closely at ways to address this problem.

With regard to small businesses, we adopted the existing Small Business Administration (SBA) definition, and required a small business to show that it has no more than a \$6 million net worth and \$2 million in annual profits for the previous two years. For some services with high capital entry requirements, however, these thresholds might be too restrictive and, therefore, we left ourselves the flexibility to seek SBA approval to modify this definition if necessary. Among the possibilities we are considering is the proposal of the SBA's Chief Counsel for Advocacy to establish a \$40 million revenue threshold for small businesses.

For each service subject to competitive bidding, we should separately attempt to create truly meaningful opportunities for minorities and women to participate both in auctions and in the provision of service, without hurting competition itself. We already have established preference policies for narrowband PCS and interactive video and data service (IVDS). In so doing, we looked at a number of factors, related specifically to those two technologies, including estimated costs to construct systems and acquire licenses, license size, and the potential services that a licensee could offer.

For instance, we determined that narrowband PCS likely will

include a wide variety of applications, including advanced paging, messaging, and advanced cordless telephones and that the system build-out costs would be relatively low. Thus, we believe that narrowband PCS is well-suited to small entities, which can offer an array of services both to the general public and to niche markets. Given these factors, we determined that a 25 percent bidding credit, together with a tax certificate program would be powerful tools to ensure minority and female participation.

Bidding credits will function as a discount on the license acquisition price and, thus, will attack directly the capital access obstacles faced by minorities and women. Tax certificates offered to investors in minority and female-owned enterprises will likewise help these entities attract start-up funding. Finally, a minority or female-owned business that qualifies as a small business will also be eligible for our installment payment option, which allows the applicant to pay off the bid price at a low interest rate over the course of the license term.

As our attention now turns to other services, such as broadband PCS, we are looking at all relevant factors in establishing a preference program that creates meaningful opportunities. At this point, we have not determined exactly which mix will best accomplish the Congressional objectives in the broadband PCS proceeding and we are, of course, interested in learning more about the specific objectives of Congress in the operative legislation.

All available preferences are currently being considered. I note, however, that, as we proceed, it is imperative that we aim to address the goal of creating meaningful opportunities for minorities, women, and small businesses to obtain licenses while recognizing the capital requirements for competing in the marketplace. Preferences that allow entities to bid successfully, but fail to take into account the characteristics of the particular service and the companies involved will result in a short-lived and hollow victory. I do not believe the statute's goals will be satisfied if our policies do not have a lasting, positive effect on the telecommunications industry. Meaningful opportunity means creating successful incentives for the creation of minority and female-owned businesses that are viable and lasting competitors.

I further note, in closing, that in establishing an appropriate regulatory approach to PCS auctions, the Commission is faced with the daunting task of balancing a number of competing Congressional objectives. As I pointed out earlier in my testimony, we have been charged with the responsibility to encourage innovation and efficient use of the electromagnetic spectrum, promote economic growth and diversity, and contribute to the U.S. Treasury billions of dollars in revenues, representing the value of the spectrum owned by all Americans. At the same time, we want to structure a fair auction process that ensures opportunities for a wide array of competitors in the wireless communications market. We appreciate the input of the

Members of this Subcommittee and all the witnesses who are participating here today, as we endeavor to accomplish each of these goals.

I am grateful for the Subcommittee's interest in the work of our agency and for this opportunity to discuss with you our mutual goals of creating diversity and promoting opportunities for all competitors. We have a window of opportunity now to ensure that all Americans have a stake in the communications industry and we cannot let that window close without doing our utmost to make sure that the future includes everyone.

I will be pleased to answer any questions you might have for me.

Thank you.

TESTIMONY OF

LARRY IRVING

ASSISTANT SECRETARY FOR
COMMUNICATIONS AND INFORMATION

U.S. DEPARTMENT OF COMMERCE

ON

DEVELOPMENT OF MINORITY BUSINESS ENTERPRISES
IN THE TELECOMMUNICATIONS INDUSTRY

BEFORE THE

SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE, AND URBAN DEVELOPMENT

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

MAY 20, 1994

Thank you, Mr. Chairman. It is my pleasure to testify before the House Small Business Committee's Subcommittee on Minority Enterprise, Finance, and Urban Development today on minority business development in telecommunications. The Administration views this issue as an important component of its major telecommunications policy undertaking, known as the National Information Infrastructure (NII) initiative. Under the leadership of Secretary Ronald Brown, the U.S. Department of Commerce is actively seeking to promote economic opportunity for minority-owned businesses in the NII. The Administration also supports minority participation in its Global Information Infrastructure initiative, which seeks to foster telecommunications advancements around the world.

My remarks today will address issues facing minority-owned businesses that seek to participate in the NII. In this regard, I will discuss the activities of the Administration, including the involvement of the National Telecommunications and Information Administration (NTIA), which I administer. I also will discuss the specific activities of NTIA's Minority Telecommunications Development Program, or MTDP. MTDP supports development of government policies that affect minority business participation in the telecommunications industry, and develops programs and activities to encourage minority ownership of telecommunications businesses.

I also want to emphasize the activities of the Commerce Department's Minority Business Development Agency (MBDA) with respect to telecommunications. MBDA and NTIA have worked cooperatively on various projects that would increase and strengthen minority entrepreneurship in telecommunications. Additionally, NTIA has provided training

on telecommunications issues to MBDA's network of Minority Business Development Centers (MBDCs). MBDCs provide business assistance to various types of minority-owned businesses around the country, including some telecommunications businesses. MBDA also commissioned a market analysis of the telecommunications industry in 1991, as discussed below.

THE NATIONAL INFORMATION INFRASTRUCTURE INITIATIVE

In this year's State of the Union Address, President Clinton called for enactment in 1994 of legislation to help ensure creation of a NII -- built around the "electronic superhighway" that has received so much media attention. Vice President Gore first announced the Administration's NII initiative in September 1993. The Administration believes that development of more advanced telecommunications and information systems in the United States can, should, and will benefit all Americans -- including members of minority groups -- by promoting economic development, improving the delivery of health care, education, and public safety services, and improving the quality of life.

It is not an exaggeration to say that, with the advent of the NII, we are standing at the threshold of a new way of life. It is a life in which Americans will be able to live where we wish without foregoing opportunities for useful and fulfilling employment; a life in which the best education, and all the vast resources of art, literature, and science can be available everywhere, not just in elite institutions or big city libraries; a life in which health and other

critically important social services can be available on-line, without waiting in line, when and where we need them.

With that vision in mind, the Administration has articulated five basic principles that should govern NII-related initiatives:

- (1) Preserve and enhance universal communications service,
- (2) Promote private investment in the infrastructure,
- (3) Provide and protect competition,
- (4) Ensure open access to the NII, and
- (5) Encourage flexible and responsive government action.

The Administration has pledged, as part of its NII undertaking, to work for passage of telecommunications reform legislation this year. Accordingly, the Administration is presently working with the sponsors of major legislation now pending in both the House (H.R. 3626 and H.R. 3636) and the Senate (S. 1822) to ensure that these principles will be taken into account in legislation.

MINORITY-OWNED BUSINESSES IN THE NII

Advances in the telecommunications and information infrastructure promise to make life better for all Americans, not just a privileged few. Minority communities, and minority businesses, will benefit from widespread availability and access to advanced

telecommunications and information services and facilities. We cannot simply assume, however, that all boats will rise with the incoming tide.

A key to full participation by minorities in the NII is being sure they are well-informed. In addition, the Administration must be adequately apprised of particular minority concerns. NTIA has worked vigorously during my tenure to make the minority community aware of potential for specific involvement in such initiatives.

- For example, last year I addressed organizations such as the National Association of Minorities in Cable (NAMIC), the National Association of Black-Owned Broadcasters, and the National Technical Association, the oldest association of black engineers, about the NII.
- In addition, NTIA's MTDP has made presentations to a number of minority organizations, including NAMIC, the Puerto Rico Chamber of Commerce, and interested parties at Morgan State University about the NII.
- Most recently, on Tuesday, May 17, owners and representatives of several small, minority-owned businesses met with an interagency policy committee that I chair to share their views on the NII. These minority business owners are eager to participate in upcoming advances in the information infrastructure, and we gained valuable insight into their concerns.

NTIA has also received significant input from minority business and community leaders through a series of field hearings held throughout the country on universal service and open access. Deputy Secretary of Commerce David Barram and I, with Commissioner Andrew Barrett of the Federal Communications Commission (FCC) and state officials, have conducted hearings in Albuquerque, New Mexico, and south central Los Angeles, California, on universal service. Further hearings were conducted in Durham, North Carolina, and Sunnyvale, California, on open access to the NII. Witnesses in those hearings representing small and minority-owned information service providers discussed potential obstacles to minority entities not faced by businesses that are larger and better funded. These forums assist us in focusing on minority concerns to ensure their full participation as the NII continues to develop.

Data on the Involvement of Minorities in Telecommunications

Even prior to commencement of NII initiatives, NTIA has strived to be aware of available data on the involvement of minorities in telecommunications fields, to better understand the concerns of minority telecommunications firms. With regard to the broadcast industry -- a very important part of the NII -- NTIA's MTDP has actively collected data on the participation of minority-owned businesses.

Since 1990, MTDP has issued an annual report entitled Compilation and Statistics of Commercial Minority Broadcast Ownership. In the 1993 report, MTDP found that, as of

August 1993, there were 300 minority-controlled commercial broadcast radio and television stations in the United States, which represents 2.7 percent ownership (out of 11,021 total commercial stations). From 1992 to 1993, minority broadcast ownership decreased by ten stations.

Total participation of minorities in broadcast ownership may be somewhat higher than tabulated, because of the definition of minority ownership (more than 50 percent minority ownership) that MTDP used in collecting this data. In addition, the data in the report was compiled from readily available sources and may not reflect all licensed stations with some minority ownership.

NTIA is familiar with other data about minority involvement in telecommunications businesses. In fact, NTIA provided technical assistance to MBDA in connection with a market study that Symbiont, Inc. performed in 1991 for MBDA on this subject.

- In general, Symbiont identified 490 minority-owned telecommunications firms, including both telephone-related and mass media firms. The study found that only one half of one percent of the total number of firms in the industry were owned by minorities.
- The study identified 15 minority cable operators in the United States -- nine black, two Hispanic, two Native American, one Asian Pacific, and one Asian Indian. This

appeared to represent around two-tenths of one percent of the number of firms in the cable industry.

- The study identified only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services.
- Minority-owned firms' greatest presence was in the telecommunications equipment manufacturing segment, where they made up 9.7% of the total number of firms.
- Revenues from all firms studied comprised less than half of one percent of total industry revenues.
- In addition, the study found that most of the minority-owned firms were small, and that access to financing was a major obstacle.

Thus, available data indicates that minority-owned businesses are generally underrepresented in telecommunications businesses. This Administration is committed to working with the Congress and the FCC to improve the existing underrepresentation of minorities in telecommunications and information industries.

Education and Training

At the hearing on universal service in Los Angeles, minority witnesses voiced concern about the need for education and training with regard to the NII, both for business owners and users of telecommunications and information services. The Clinton Administration is firmly committed to improving education and training for all Americans, and in so doing, ensuring that minority-owned businesses, in particular, can participate fully.

Obviously, broad-based educational initiatives will benefit all Americans, not just minorities. Access to the information infrastructure can help teach skills to both children and adults that will enrich their lives and better prepare them for the job market. Moreover, people who are familiar with the information infrastructure will be better prepared to enter business ventures related to the NII.

NII initiatives directly address education and training concerns. Vice President Gore announced earlier this year that an important goal of the NII initiative is to interconnect every American classroom, health care facility, and library by the year 2000, using public-private partnerships.

To help further this goal, NTIA initiated this year a matching grant program, the Telecommunications and Information Infrastructure Assistance Program (TIIAP), that will help fund demonstration projects by schools, libraries, health care facilities, and other

community organizations in support of the NII. Applications for the first round of grants were due on May 12, 1994, and NTIA received approximately 1,050 applications.

Minorities in particular will benefit from the TIIAP, because regulatory policies governing this program include the requirement that special consideration be given to grant applications that involve minorities. Among the grants that may benefit minority communities, Secretary Brown committed the award of at least one grant to an entity in an "empowerment zone" -- that is, an impoverished urban or rural area specially designated by the Department of Housing and Urban Development and Department of Agriculture to receive economic development incentives that will empower the community to improve economic and other conditions for the people within it.

While the TIIAP's goal is to fund projects that demonstrate useful technologies, the grant program will be especially helpful to people in communities that are less able to afford to pursue these projects without federal assistance. Our intent is to ensure that the best education and the best health services can be made available everywhere, not just at institutions with the largest endowments or communities with the most economic or political clout. I want to work to see that places like Howard University, as well as places like Harvard University, are connected to the NII, and that high school students in places like Bedford-Stuyvesant and Belair all have exposure to the NII. Statistical and anecdotal evidence suggest that it may be more important for the child in Bedford-Stuyvesant to have

access to information technologies in public institutions such as libraries and schools, because he or she may not have a computer at home. The child in Belair probably will.

In addition, it is also important to note that the grant projects funded through the TIIAP will serve as models for others to emulate. This will be helpful to those without experience in the telecommunications and information areas, including many minority organizations.

Improvements in education and access to technology alone, however, will not be sufficient to address the education and training concerns of minorities that were discussed at the universal service hearings in Los Angeles. Business training is critical for all entrepreneurial ventures and small businesses, including those owned by minorities. Entrepreneurial ventures are always risky, and well-developed public support can make a tremendous difference in whether a business will succeed, thereby creating new jobs, services, and products. While MTDP's primary mission is to increase minority ownership of communications businesses through policy input, MTDP also develops programs that focus on the specialized needs of minorities in the telecommunications industry. Some activities, which predate NII initiatives, also complement the Administration's current NII objectives.

For example, MTDP designed and implemented ComTrain, an executive management training program for new minority broadcast license owners. MTDP began the ComTrain program in June 1990, with funding from MBDA, to promote the viability of minority-

owned broadcasting. This program gives new minority broadcast owners an opportunity to spend two to five days at a successful commercial station, working closely with that station's general manager and department heads to study areas of broadcasting that are of specific interest to them. MTDP also provides trainees with information concerning broadcast management and station operation in advance of their training. In addition, ComTrain arranges free consultant services, volunteered from established broadcasters, to trainees once their stations are on the air. Private sector consultants visit the trainees' stations and offer hands-on advice.

Loretta Lever of Little Rock, Arkansas is a good example of a radio station owner who is a ComTrain success story. Ms. Lever, a black woman without broadcast management experience, came to ComTrain equipped with a construction permit from the Federal Communications Commission and the dream of owning a successful radio station. In 1992, through MTDP, Ms. Lever was paired with an Emmis Broadcasting radio station, WDCJ-FM in Boston, Massachusetts, where she received valuable advice on daily operations in the radio business and learned some of the pitfalls of ownership to avoid. Her station, WFXV-FM, has now been on the air for two-and-one-half years.

The ComTrain program has been successful since its inception. Both corporate sponsors and trainees have received benefits. There are currently 12 volunteer corporate sponsors of ComTrain that provide the training, most of which have participated in the program for all four years of its existence. Since June 1990, ComTrain has trained 19

minority radio or television licensees, and three more are scheduled for training. Nine of these stations are already on the air. Several owners whose stations are on the air have participated in follow-up training involving on-site consultations at the minority-owned stations. While it is the good business judgment and perseverance of the station owners that enabled these stations to go on the air, we believe that ComTrain made a valuable contribution in these cases.

Access to Capital

Another MTDP activity that predates the NII initiatives but nonetheless supports NII objectives is MTDP's ongoing attention to the issue of access to capital by minority telecommunications firms. Access to capital is necessary to increase minority participation in the industry. NTIA is familiar with data from several sources on this subject:

- Capital formation historically has been and remains one of the major economic barriers to full participation in telecommunications markets by small and minority-owned businesses, according to the FCC's Small Business Advisory Committee's 1993 report and other sources.
- "Family, friends, and acquaintances" are the primary source of start-up capital for small minority businesses, according to a 1990 MBDA study. Such sources of capital are not always sufficient and may be adequate only for businesses with small capital requirements. Many businesses that would be part of the NII would require

substantially larger amounts of capital than that, and already-established communications businesses could require substantial additional capital to expand into NII-related businesses.

Due to these concerns, MTDP is studying new strategies for capital formation that can be made available to minority communications firms. With the assistance of outside contractors, MTDP is examining methods used to aggregate capital and attempting to develop new strategies for capital development in telecommunications that can contribute to the dialogue in this area. NTIA expects to release a report on these issues later in the year, and to engage in public outreach on this topic.

Reducing barriers to participation in telecommunications markets, such as problems with access to capital, is a key part of the Administration's objective of promoting private investment in the NII. Consistent with this principle, NTIA plans to file comments today with the Small Business Administration in an SBA proceeding that is important to minority firms involving access to capital. The SBA is proposing to repeal its media policy or "opinion molder" rule, which bars the SBA, with limited exceptions, from making business loans to any applicant in the media business. This rule applies broadly to a variety of enterprises that are or could be part of the NII. Among other things, it precludes SBA financial assistance for small broadcasters, many of which are minority-controlled, as well as small cable companies and programmers.

The original rationale for the media policy rule was that government should not provide financial assistance to media firms in order to avoid governmental interference, or the appearance of governmental interference, with the constitutionally protected freedoms of speech and press. These important concerns can be addressed, however, by basing criteria for financial assistance on whether a firm is credit-worthy, and not with regard to the content of the firm's communications.

MTDP is also extensively involved in outreach to minority communities on capital formation issues. MTDP presents and participates in national and regional conferences on business opportunities and financing for new telecommunications technologies. For example, for the past four years, MTDP has co-sponsored an annual "Fast Starts" conference for entrepreneurs, lenders, and attorneys with New York University Law School and the FCC. These conferences focus on business opportunities in telecommunications. The most recent seminar, held April 27-28, addressed some of the issues involved in developing businesses in Personal Communications Services (PCS) and other technologies expected to flourish as the NII develops.

Recognizing the strong interest of minority firms in PCS, MTDP recently developed a list of businesses interested in strategic partnerships with minority and women entrepreneurs and small businesses interested in PCS. Due to the extensive capital investment necessary to initiate such a new service, strategic partnerships will be critical for minority businesses seeking to become involved in the provision of new technologies. Given the importance of

these issues to the United States, NTIA believes it imperative to encourage further minority participation in the NII. Because new technologies and services, such as PCS, are rapidly developing, minorities must have access to the knowledge, the capital, and the opportunity to become involved in the NII through business ownership and as users.

Personal Communications Services

In recent spectrum management legislation, Congress was very clear in mandating that the FCC ensure that "designated entities," including small businesses and minority-owned businesses, are given the opportunity to participate in spectrum-based services, such as PCS. In a September 14, 1993 letter to the FCC, NTIA encouraged the FCC to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by groups currently underrepresented in telecommunications industries. NTIA further noted that the nature and extent of the economic opportunities that will be available in PCS for a wide variety of applicants depends, in important respects, on the allocation decisions made in the proceeding, and NTIA stated that the FCC should keep this in mind in designing its allocation plan for PCS.

NTIA is now reviewing rules released by the FCC on April 20 specifying that mechanisms such as installment payments and bidding credits may be allowed when spectrum licenses are auctioned, and that some blocks of radio spectrum in some services may be set aside specifically for such entities. We note that the FCC is in the process of making decisions regarding the preferences for designated entities that will be available in some

specific services. For example, on May 10 the FCC released rules on preferences for narrowband PCS, which could include services such as advanced paging, messaging, and advanced cordless telephones. Such preferences include bidding credits, tax certificates, and installment payments.

These minority preference policies are tools intended to help firms that might otherwise find it difficult to participate in spectrum-related businesses. They reflect the important policy judgment that some entities may have capital disadvantages and may not be able to participate in spectrum-based businesses without preferences.

We agree with the FCC that these competitive bidding rules help promote the goals of economic development and universal access to telecommunications services, consistent with the Administration's principles for further development of the NII. We also note that it is important to us that the government's policy enriches and empowers entire communities, rather than making a few individuals wealthy.

The FCC faces a difficult task in addressing competitive bidding issues, and has appropriately determined that designated entities should be considered separately from the traditional players. NTIA is currently reviewing the Commission's specific policies and determining whether to take positions on any of the rules.

CONCLUSION

In our generation, we can realize the vision that telecommunications technology can enhance the lives of all Americans, not just the privileged. We can ensure that all Americans -- including members of minority groups -- will have access to an advanced information infrastructure. This Administration is determined to achieve these goals. Under the leadership of Secretary Brown, NTIA will follow through on that commitment. We look forward to working with you as we address these goals together.

Thank you for the opportunity to present these views to you today. I would be pleased to respond to any questions that you may have.

SUBMISSION OF TESTIMONY OF

ROBERT L. JOHNSON

PRESIDENT AND CHIEF EXECUTIVE OFFICER
BET HOLDINGS, INC.

ON

DEVELOPMENT OF MINORITY BUSINESS ENTERPRISES
IN THE TELECOMMUNICATIONS INDUSTRY

BEFORE THE

SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE, AND URBAN DEVELOPMENT

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

SUBMITTED JUNE 15, 1994

TESTIMONY OF ROBERT L. JOHNSON

I submit these comments to the Subcommittee on Minority Enterprise, Finance and Urban Development, on the eve of the Federal Communications Commission's ("Commission") momentous decision regarding the broadband Personal Communications Services ("PCS") auction rules, to share my thoughts regarding the Commission's efforts to encourage the participation of minority-owned businesses in the provision of PCS. I write on behalf of BET Holdings, Inc. ("BHI"), a publicly traded minority-owned business, to emphasize the importance of adopting rules that provide meaningful opportunities for minority-owned businesses to acquire PCS spectrum and to deploy new and innovative telecommunications systems.

As you are aware, the Commission recently adopted "generic" auction rules in the Second Report and Order issued in its on-going Competitive Bidding Rulemaking proceeding.^{1/} Although the Commission has taken significant steps to encourage the entry and expansion of minority-owned entities within the telecommunications industry, BHI believes that unless the Commission clarifies and refines its generic competitive bidding rules, the anticipated involvement of designated entities in the provision of broadband PCS will be jeopardized. BHI submits this testimony to the Subcommittee in the hopes of ensuring that Congressional directives are fulfilled, and that the Commission's rules reflect the letter and spirit of Congress' delegated authority.

I. THE COMMISSION SHOULD ADOPT THE PREFERENCES ENUMERATED IN ITS ORDER

The recommendations submitted herein are offered to reflect the real market pressures and unique challenges facing minority-owned businesses as they seek to participate successfully in the upcoming broadband PCS auctions. Given the capital intensive nature of broadband PCS, it is imperative that the preferences enumerated in the Second Report and Order be available for designated entity broadband PCS auction participants. Further, if the Commission truly is interested in establishing a level playing field, the preferences afforded designated entities must be significant. Without an auction framework that affords minority and female-owned entities the ability to challenge entrenched industry players for valuable spectrum, we will find ourselves relegated to niche markets, providing services of only limited capability and capacity.

II. THE COMMISSION SHOULD ADOPT THE BROADCAST "CONTROL" DEFINITION FOR MINORITY AND FEMALE-OWNED ENTITIES

The Second Report and Order provides a strict eligibility standard for minority and female-owned entities

^{1/} See Second Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 (released April 20, 1994).

seeking to benefit from designated entity preferences. In order to be classified as a "designated entity," minorities or women must have at least 50.1% equity ownership and 50.1% controlling interest in the auction applicant business enterprise. The interests of minorities and women will generally be calculated on a "fully-diluted" basis.²

For application in the broadband PCS context, BHI believes that the Commission should adopt the broadcast "control" rules. In applying the tax certificate policy to minority acquisitions under the Minority Ownership Policy for the broadcast and cable television industries, the Commission has not required that minority group members in control of a purchasing entity also possess 50.1% of the equity in the business to qualify the seller or investors for a tax certificate. In fact, for minority controlled corporations, the Commission routinely issues tax certificates without addressing equity ownership at all.

Similarly, for limited partnerships, the equity requirements provide greater flexibility than current PCS rules. For instance, the Commission requires that the general partner be a qualified minority controlled entity with at least a 20% equity interest. BHI submits that adopting a similar approach to the ownership and control of broadband PCS licenses would better accomplish Congress' goal of facilitating the participation of minority-owned business in PCS, as well as increasing their representation in the telecommunications industry on the whole.

Finally, to avoid confusion in the definition of minority and female-owned entities, it is important that the Commission confirm that the equity ownership and control tests are applied to the overall ownership structures or partnership arrangements established either by the company deemed to be a designated entity or by the auction participants. The requirements need not be met for each class of outstanding stock; rather, the test is to be applied in aggregate to the overall ownership and control structures in a multi-tier stock corporation.

III. EXCLUSION OF PUBLICLY TRADED COMPANIES FROM TAKING ADVANTAGE OF BIDDING CREDITS HAS NO RATIONAL POLICY OR STATUTORY BASIS

In establishing service-specific rules for Narrowband PCS, the Commission inexplicably -- and without notice or comment -- retreated from its efforts to encourage the participation of minority and female-owned entities in the provision PCS by limiting the availability of bidding credits to non-publicly-

^{2/} All stock options and convertible debentures, or other conversion rights, therefore, will be considered to have a "present effect on the power to control the entity." See Second Report and Order at para. 277.

traded minority and female-owned entities.^{3/} Without explanation, the Commission excluded companies such as BHI that under the generic competitive bidding rules were fully qualified to benefit from these preferences.

This restriction should not be adopted for broadband PCS. Given the extensive capital investment and tremendous costs associated with the purchase and build-out of broadband PCS systems, any limitation on the availability of bidding credits to publicly-traded minority or female-owned companies would defeat opportunities for their participation in PCS.

Moreover, the application of such a rule would be arbitrary and capricious and would result in significant market anomalies. Privately held companies controlled by designated entities commanding virtually unlimited resources would benefit from a bidding credit in the spectrum auction, while significantly smaller publicly-traded companies with restricted cash flow or limited credit would remain unaided by the preference. Any disparity in treatment by distinguishing between minority and female-owned companies in this way, has no rational policy or statutory basis.^{4/} Congress directed the Commission to encourage the participation of all minority and female-owned entities. Whether otherwise qualified designated entity companies are publicly traded does not alter their classification under the statute or the Commission's Rules, or in any way deprive them of the preferences available to others within the same class.

3/ See Third Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 at para. 80 (released May 10, 1994) ("In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we will prohibit publicly-traded companies from taking advantage of the bidding credits."). BHI submits that the Commission lacks the legal authority to withhold, *i.e.*, write classes of designated entities out of its rules. See ACLU v. FCC, 823 F.2d 1554 (1987).

4/ For example, if the narrowband rules were also adopted for broadband PCS, BHI would be unable to benefit from the bidding credit preference while TLC Beatrice International Holdings, Inc., a privately held minority-owned business, could claim the discount. TLC Beatrice, however, is significantly larger than BHI, commanding more resources and presumably having access to more favorable credit arrangements. See Black Enterprise, B.E. 100s Overview, Coming on Strong (June 1994). The Commission simply cannot justify such treatment in light of its directive "to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process." See House Report No. 103-111 at 582.

IV. SIGNIFICANT BIDDING CREDITS ARE REQUIRED TO CREATE
A LEVEL PLAYING FIELD FOR BIDDING

Concerns regarding the ability of designated entities to compete in PCS auctions have already been raised before this Subcommittee. For example, during his exchange with Chairman Reed Hundt on May 20, 1994, Representative Mfume correctly recognized that a bidding credit of 72% may be necessary to permit designated entities to compete with companies with tremendous cash flows, such as Bell Atlantic.^{5/} Accordingly, BHI submits that a significant bidding credit is required if designated entities are to be able to compete for the 30 MHz blocks of spectrum and satisfy the requisite build-out requirements.

There can be little doubt, at this point in the PCS proceedings, that the implementation of broadband PCS services will cost hundreds of millions of dollars. It is also irrefutable that designated entities simply do not have access to the level of capital available to established industry telecommunications providers. Thus, to satisfy Congress' directive, the Commission's broadband rules must equalize the bidding environment to accommodate these marketplace inequities. In the context of broadband PCS, this should be done through a substantial bidding credit.

A bidding credit serves two functions: (1) it encourages designated entity participation; and (2) it creates an incentive for the financial community to view designated entities as viable PCS players. Under the current rules, it has been expressed repeatedly that minority and women-owned businesses are not considered "healthy risks." In fact, during a number of PCS seminars, and in response to the inquiries of the PCS Task Force, venture capitalists and mortgage bankers indicated that designated entities might be better off not bidding on PCS spectrum at all, but rather joint venturing with established telecommunications companies already equipped with infrastructure and telecommunications experience. This, however, is not what BHI believes Congress envisioned. The availability of a substantial bidding credit would ensure independent minority-owned business participation in the auction process and ultimately in the provision of PCS.

5/ See Federal News Service, May 20, 1994, Comments of Representative Mfume, Before The Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Representative Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman.

V. PREFERENCES FOR MINORITY AND FEMALE-OWNED BUSINESSES SHOULD NOT REQUIRE THAT SUCH BUSINESSES ALSO BE "SMALL"

In the broadband PCS auction rules, the Commission should confirm that preferences available to minority and female-owned businesses are distinct from all other preferences, including those established to encourage the participation of small businesses. As indicated in both the Budget Act and its legislative history, Congress's directive to the Commission was to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."^{6/} Each enumerated group was identified individually as eligible for preferential treatment in the assignment of radio spectrum. It was not anticipated, therefore, that the Commission would provide preferences only for "small" minority-owned businesses, or in any way limit the availability of minority preferences according to a pre-determined revenue cap.^{7/} To do so would contradict the explicit and unambiguous directive of Congress. Moreover, such a policy could shut out designated entities that have the financial wherewithal to operate broadband PCS systems successfully.

Providing particular preferences to minority and female-owned entities, and others to small businesses and rural telephone companies, would not contravene the dictates of the equal protection clause of the U.S. Constitution, nor would it constitute unlawful race or gender-based regulation. The government's interest in ensuring economic opportunity for minorities is emphatic and longstanding. Congress has legislated in this area for many years, with respect, for example, to employment,^{8/} government contracting,^{9/} and telecommunications.^{10/} Thus, facilitating full minority participation in the American economic dream is not merely an important governmental interest; it is a compelling interest which has driven Congressional action for at least three decades.

6/ See Budget Act, Sections 309(j)(3)(B) and (4)(C).

7/ See e.g. House Report No. 103-111 at 582 ("the Commission should adopt regulations ... to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process") (emphasis added).

8/ Congress' interest in facilitating employment was first substantially expressed thirty years ago in Title VII of the 1964 Civil Rights Act, 78 Stat. 253.

9/ Fullilove v. Klutznick, 448 U.S. 448 (1980).

10/ See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (requiring FCC continuation of minority broadcast preferences).

VI. EVIDENCE OF ECONOMIC "DISADVANTAGE" IS NOT NECESSARY FOR PREFERENCE AVAILABILITY FOR OTHERWISE QUALIFIED DESIGNATED ENTITIES

The designated entity classification is intended to benefit enumerated categories of individuals and businesses that have been historically under-represented in the telecommunications and mass media industries. As indicated in the text of the Budget Act and the legislative history, Congress' purpose for providing designated entity preferences was to disseminate licenses among a wide variety of applicants.¹¹ Consequently, the Commission recognized that the groups identified in the Budget Act have traditionally been under-represented in the ownership of non-broadcast licenses, and promulgated rules to encourage their participation in the provision¹² of new and innovative radio-based telecommunications services.

BHI believes that the Commission should reaffirm, in its broadband PCS rules, that evidence of "disadvantage" against particular groups in the context of radio licensing or financial lending practices is not necessary for preference availability. As evidenced above, Congress did not limit the availability of preferences only to the "economically disadvantaged." In fact, the Chairman of the Commission recently confirmed an intention to use the full range of preferences to remedy the severe under-representation of minorities and women in telecommunications -- a social ill which remains to be corrected.¹³

11/ See Budget Act § 309(j)(3)(B) and (4)(D); House Conf. Rep. No. 103-213 at 1171.

12/ See Competitive Bidding NPRM at para. 74 & 80; Second Report and Order, at para. 230 ("the preferences will allow these designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital"). See also Appendix C, Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 (released October 22, 1993) (Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket No. 90-314, September 15, 1993) (indicating that women and minorities have encountered special barriers to telecommunications ownership).

13/ See Federal News Service, May 20, 1994, Comments of Representative Mfume, Before The Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Representative Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman (recognizing that minorities represent 64 percent of the American population, yet minorities and women represent only 2.7% of
(continued...)

It also must be confirmed that the preferences are not limited merely to minority or female-owned businesses seeking to enter the communications marketplace for the first time. Entities already operating within the communications industry, but seeking to expand their offerings to telecommunications services, should be equally eligible for the minority and female-owned entity preferences.

VII. THE COMMISSION SHOULD ADOPT STRICT RULES ON HOLDING PERIODS TO PREVENT UNJUST ENRICHMENT RESULTING FROM "SHAM" TRANSACTIONS

Finally, BHI supports the Commission's efforts to prevent auction winners from acquiring licenses for less than true market value at auction and then transferring them for a large profit prior to providing service.^{13/} However, BHI believes that the rules regarding license trafficking must be strict if designated entities are to be afforded continuing opportunities to provided PCS service. Specifically, BHI recommends that the Commission establish a 7-10 year holding period for all designated entities unless a transfer or assignment is made to another qualified designated entity.

Such a rule will ensure that minorities and women retain the level of representation in the industry afforded by the implementation of the Commission's PCS auction rules. Any rule which prescribes a shorter holding period, e.g. 2-4 years, will not prevent bidders, taking advantage of the Commission's preferences, from viewing their investment as merely temporary. Because the deployment of a PCS system is likely to be a significant undertaking, the Commission's rules must encourage designated entity ownership throughout the PCS build-out process.

VIII. CONCLUSION

BHI believes that the Commission today faces one of the most challenging opportunities of this century. Not only will the Commission be determining the ground rules for the provision of new and innovative telecommunications services, but it will be shaping the competitive make-up of the future PCS marketplace. To ensure that all Americans are included in the communications revolution, however, it is imperative that the Commission's rules provide minorities and women real opportunities in broadband PCS. Unless the broadband PCS rules provide a level playing field for bidding on all spectrum blocks and for all service areas, the

13/ (...continued)
broadcast properties; there are only seven minority-owned cable companies in the country; and there is only a .5% ownership by minorities in the telephone and radiotelephone communications sector).

14/ See Second Report and Order, at para. 212.

Commission runs the risk of perpetuating the under-representation of these groups in the telecommunications industry.

Respectfully submitted,

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NAMTEC

National Association of Minority Telecommunication Executives and Companies

Prepared for

**U.S. House of Representatives
Small Business Subcommittee on
Minority Enterprises, Finance, and Urban Development**

May 24, 1994

National Association of Minority Telecommunications Executives & Companies

TESTIMONY OF

Mr. Joseph Profit
Chairman

**National Association of Minority Telecommunications Executives & Companies
Prepared for the U.S. House of Representatives
Small Business Subcommittee on
Minority Enterprises, Finance and Urban Development**

National Association of Minority Telecommunications Executives and Companies (NAMTEC) is a 501(C)(3) non-profit organization formed in 1987 with over 300 members nationwide. NAMTEC members have the potential to revolutionize the way people communicate with each other while also spurring our nation's economic growth, through creation of high-wage, high-tech jobs, and improving the U.S.'s international competitive position. The regulation of this new PCS industry poses a challenge of historic proportions for the Federal Communications Commission: fashion a regulatory framework which promotes rapid availability of new and innovative services throughout the country while fostering development of a marketplace which is competitive and diverse.

In the 1993 Budget Act, Congress, recognizing the potential economic growth spurred by this technological revolution, authorized the Commission to auction spectrum licenses for new emerging technologies to increase federal revenues. Notwithstanding the clear need for additional revenues to reduce the federal deficit, Congress decided that increased revenues were not to be the predominant factors to be considered by the Commission when designing its auction rules for spectrum licenses. Indeed, Congress mandated the Commission to ensure that small businesses, businesses owned by women and minorities and rural telephone companies (the "designated entities") have a genuine opportunity to participate in the offering of new personal communications services to the nation's consumers.

This statutory requirement derived from Congress' commitment to foster economic growth among segments of the population and in regions of the country which historically have not benefitted fully or fairly from technological innovation and/or the opportunity to participate in the award of government contracts because of the government past official policy of race discrimination. However, on August 10, 1993, the Omnibus Budget Reconciliation Act mandate constitutes a bulwark against excessive concentration of power

in this new industry, particularly in the hands of a few giant companies already entrenched as dominant forces in the communications marketplace. After considerable research and studies, we submitted the following results. Let's take a minute and look at the history of set-a-sides.

America's Long History of 100 Percent Racial Quotas in Favor of Whites

For 300 years the American Colonies, the States and the Federal Government allotted untold billions of dollars of public wealth exclusively to members of the white race.

*1675 - Massachusetts Bay Colony cedes plantation rights in six-square-mile tracts to "worthy" individuals. The population of the Colony included blacks slaves as well as free blacks. Neither were treated as "worthy" individuals eligible for land grants.¹

*1683 - Maryland and Virginia establish fifty-acre land grants to settlers who pay their own way across the Atlantic. Blacks were given a free ride in slave ships and thus were not eligible for grants.²

*1785 - The federal Ordinance of 1785 authorizes the sale of 640-acre tracts to settlers for \$1 per acre. As slaves, blacks were legally prohibited from owning property.³

*1800 - The federal government establishes liberal credit privileges in the western territories for buyers of public land at a price of \$1 an acre. Slaves not eligible and free blacks generally considered uncreditworthy.⁴

*1830 - The federal Preemption Act grants land settlers rights to purchase up to 160 acres each at \$1.25 per acre. The vast majority of blacks are still slaves and ineligible to own property. No evidence of significant participation by free blacks.⁵

*1850 - The beginning of the massive federal land grant program for private railroad companies. Outright awards of 130 million acres frequently include property for twenty miles on either side of roadbeds. These lands later found to contain billions of dollars of petroleum and mineral reserves. Black businessmen never considered qualified to acquire, finance, or operate railroad franchises.⁶

*1862 - The Homestead Act grants settlers 160-acre tracts of federal land without

^{1,2,3,4,5,6} Sources: A thorough historical summary of American public land grants may be found in Peter Wolf, Land in America (New York: Pantheon Books, 1981). Minerals rights information is from Stephen L. McDonald, The Leasing of Federal Land for Fossil Fuel Production (Baltimore: John Hopkins University Press, 1979). The history of aviation is detailed in Carl Soberg, Conquest of the Skies (Boston: Little Brown & Co., 1979). Information on the history of radio and television franchising appears in Erwin G. Krasnow and L.B. Longley, The Politics of Broadcast Regulation (New York: St. Martins Press, 1973). Government procurement data are from the federal Office of Management and Budget.

charge. Over 250 acres of public lands transferred almost exclusively to whites in the most important land grant program in American history. Negro claimants blocked by lynch mobs, intimidation and refusals of local authorities to protect their claims.⁷

*1889 - In the celebrated Oklahoma Land Rush, 150,000 white settlers scramble to claim the choicest land. Savage lynchings, Ku Klux Klan terrorism and Jim Crow legislation kept Negroes out. Later the heirs and successors of white settlers were to discover billions of dollars of petroleum resources on these lands.⁸

*1920 - The Mineral Leasing Act authorizes the federal government to lease public land for the exploration of oil, gas, and other minerals. Affluent Negroes need not apply. Race discrimination in public awards was the established policy of the federal government in the 1920s.⁹

*1926 - The federal Air Commerce Act authorizes the granting of monopoly air routes to qualified aviators. The nation's airlines are born. Twenty thousand white pilots learned their trade in the rigidly segregated World War I Army Air Corps ensuring that the ownership of commercial aviation would be lily white.¹⁰

*1927 - the federal Radio Act authorizes the award of radio station broadcast franchise to private citizens. Under settled policy of the federal government, no grants were made to Negroes. Radio broadcast licenses currently valued in the billions of dollars are now held almost exclusively by whites.¹¹

*1939 - The Federal Communications Commission issues the first licenses for television broadcast stations. No grants made to Negroes until token awards of the late 1970s. In 1980, all major television franchises, valued at \$5 billion, held exclusively by whites.¹²

*1941 - Government contracting becomes a major factor in the sales, revenues, and profits of private enterprises. Race discrimination in government contract awards becomes the official policy of the United States government. During the year 1941 to 1980, approximately \$3 trillion in contract awards were made almost exclusively to white-owned firms.¹³

^{7,8,9,10,11,12,13} Sources: A thorough historical summary of American public land grants may be found in Peter Wolf, *Land in America* (New York: Pantheon Books, 1981). Minerals rights information is from Stephen L. McDonald, *The Leasing of Federal Land for Fossil Fuel Production* (Baltimore: John Hopkins University Press, 1979). The history of aviation is detailed in Carl Soberg, *Conquest of the Skies* (Boston: Little Brown & Co., 1979). Information on the history of radio and television franchising appears in Erwin G. Krasnow and L.E. Longley, *The Politics of Broadcast Regulation* (New York: St. Martins Press, 1973). Government procurement data are from the federal Office of Management and Budget.

NAMTEC advocates the issuance of FCC regulations: (1) permitting designated entities (especially minorities and women) the option of either electing to bid against other designated entities in a (C Band) 20 MHz or (C Band) 30 MHz set aside block for exclusive use by designated entities or utilizing a set of bidding credits to compete against other potential PCS providers in general bidding; (2) ensuring that designated entities do not have limitations on their ability to raise capital to compete with other PCS providers; and (3) expediting the deployment of PCS.

Now, let's review the type of competition that we don't need to be protected from. Listed below are 12 of the largest companies in the country that all desperately want PCS bandwidth for the major markets. Whether this bandwidth is two or three bands of 30 MHz, there are still at least 12 companies that are going to bid for it. Listed below is the size of the competition.

**LARGE U.S. TELEPHONE COMPANIES
SELECTED STATISTICS**

COMPANY	REVENUE	EBIDAT	BOOK	EMPL'S
Ameritech	\$11.7	\$ 5.0	\$ 7.8	67,200
Bell Atlantic	13.0	5.8	8.2	73,600
Bell South	15.9	6.9	12.1	95,100
NYNEX	13.4	5.2	8.4	79,200
Pacific Telesis	9.2	4.4	7.3	55,400
Sooth Western Bell	10.7	4.7	5.9	58,400
U.S. West	10.3	4.7	5.9	60,800
GTE	19.7	7.6	7.3	131,200
AT&T	67.2	11.3	13.0	308,700
MCI	12.0	2.8	3.6	31,000
Sprint	11.4	3.1	3.2	52,000
Air Touch	1.0	0.3	3.4	N/A
TOTALS	\$195.5	\$61.9	\$86.7	1,012,600

Now, before the next chart, let's do a sanity check. These twelve companies have combined revenues of close to \$200 million, profits of \$60 million and over one million employees. We expect to be told that designated entities do not need a set-a-side, that 25% auction credits will create an even playing field. It defies the imagination.

Let's look at what level of bidding credits it would take to have an even playing field during the auction. Bid prices in the valuation of any business is determined by discounting the expected stream of cash flows back to present value. The chart below implies that a large

capitalized company with a 10% cost of capital could bid \$14.48 per POP in a market area and still earn its requisite 20% return on investment. In contrast, a designated entity with a 20% cost of capital, facing identical cash flows could only bid \$4.02 per POP to get the same return.

This inverse relation between cost of capital and valuation holds irrespective of changes to projected cash flows. These aren't my figures. These are the figures contained in a study submitted to the FCC by Time Warner on September 10, 1993. They've had these numbers and relationships for nine months and appear to have disregarded their importance.

**AUCTION CREDITS
CREATING AN EVEN PLAYING FIELD**

Company Capital	Average Cost of Capital	Bid Price Per POP	Designated Entity Dis. Required
RBOCS & GTE	10.0%	\$14.48	72.2%
AT&T, MCI, ETC	12.5%	\$12.19	67.0%
ALTEL, SNET	15.5%	\$08.18	50.9%
ROCHESTER TDS	15.5%	\$06.59	39.0%
DES. ENTITIES	20.0%	\$04.02	0.0%

This chart is pretty self explanatory. To create an even playing field designated entities need a varying discount depending which of the above companies are competing for the bandwidth. Trying to establish such a discount would be an administrative nightmare.

Mr. Chairman, we believe that Congress mandated small business participation. Last year, the FCC lived up to those expectations. It proposed setting aside two bands for designated entities. It also appeared as if it was going to create competitive bidding rules that would encourage minority participation in PCS. Now, we believe that the FCC has changed its mind and determined that small companies should not have a position in the deployment of this new technology.

We have spent a lot of time and money just waiting for the FCC to make up its mind. We believe that minority participation is good for the country and that Congress understood this when it issued its mandate. We need Congress to reaffirm its commitment to the designated entities by instructing the FCC to establish a 30 MHz band as a set-aside for designated entities while at the same time insisting that the competitive bidding rule be flexible enough to allow for the financing of these small companies.

I. Economic Challenges for Designated Entities

For the wireless communications industry, capital formation is the major economic barrier to full participation by designated entities. As an example of the capital intensive nature of the PCS industry, the Congressional Budget Office ("CBO") has estimated that at least \$35 - \$37 per person in capital costs and initial operating losses will be needed to make an after-tax return of 13 to 15 percent, given a 20-25 MHz spectrum license. At least \$155 million will be needed to construct and operate a profitable PCS system for the Washington Basic Trading Area ("BTA"); \$90 million will be necessary to build and operate a PCS system for the Baltimore BTA and approximate \$6 million will be necessary for a profitable PCS system in the Salisbury, Maryland BTA. This sum of capital to construct just one PCS system has traditionally been prohibitive for designated entities to raise.

This barrier is magnified due to the fact that PCS licenses will be auctioned to the highest bidder. Assuming a maximum \$15 per person bid as the CBO did in its study, the amount up-front capital is staggering. The estimated winning bid amount translates into \$64 million for the Washington BTA, \$37 million for the Baltimore BTA and \$2.5 million for the Salisbury, Maryland BTA. The amount of capital involved, the Commission's Small Business Advisory Committee has suggested, precludes designated entities from seriously bidding for these licenses absent a clear system of preferences.

One way to ensure that designated entities will have an opportunity to level the playing field in these high dollar auctions and for the Commission to disseminate licenses among a diverse pool of applicants is to provide designated entities an option of how they best compete in the PCS spectrum auctions. NAMTEC urges the Commission to set aside a 30 MHz spectrum block in the (C Band) for exclusive licensing to designated entities. If a designated entity chooses this option, it would only be permitted to bid in this set aside spectrum block nationwide. Alternatively, the designated entity could elect to utilize a system of bidding credits to bid for spectrum licenses in all of the other spectrum blocks other than the set aside block. By permitting this optional framework, the Commission would be encouraging entrepreneurial creativity by allowing designated entities to determine which option would afford it the greatest economic opportunity to participate in offering spectrum-based services.

Moreover, once a PCS license is awarded to a designated entity, the Commission must ensure that the designated entities have the ability to raise capital without limitation to

construct and operate a viable PCS system. Without this bidding structure and the freedom to raise capital, Congress' goal of an array of PCS providers offering a diverse set of communications technologies will be thwarted.

II. Diversity in Ownership Benefits the Public Interest

Small businesses, minority and women-owned businesses, have been the engines of job growth in the U.S. and have been at the forefront of technological innovation. The Commission has recognized the importance of innovation in numerous proceedings such as pioneer preferences and experimental licenses. The pioneer preference were licenses given to several (non-minority) companies with no apparent value to the government. It only seems fair that the preference be given to the minority and women-owned, i.e., set asides where minorities will be competing amongst themselves with the funds from that competition going to the government. Ensuring designated entities in PCS license in each geographic market is wholly consistent with past practice and is vital to America's continued economic growth and international competitive position.

Diversity of viewpoint will be expanded by disseminating licenses among businesses owned by minority and women. It can no longer be assumed that a PCS entity, as a common carrier provider, does not have a First Amendment right to freely express its viewpoints across its common carrier network as a recent federal court determined. A set-aside and a set of bidding credits will ensure that the diverse group of designated entities is given an opportunity to express its First Amendment rights.

A wide diversity of ownership will satisfy the Congressional mandate to avoid a concentration of licenses among a few "deep pocket" entities and limit the diversity of viewpoints expressed. By disseminating licenses among a wide pool of applicants, the threat of excessive ownership concentration in the wireless communications industry will be diminished.

A spectrum set aside and the use of bidding credits will ensure that given the extensive capital requirements needed to be awarded a license, let alone the capital necessary to build and operate a profitable wireless system, designated entities will be able to participate in providing PCS and be afforded the economic opportunity that competitive bidding was designed to offer.

Federal government set asides and preferential financial treatment to achieve public policy goals have been used for decades in government contracting to ensure economic

opportunity is available to small businesses and businesses owned by minorities and women. The Commission has made extensive use of minority set asides and tax certificates in the Mass Media area to raise the level of diversity in broadcasting. Moreover, the Department of Transportation and the Defense Department have instituted minority owned-business preference programs to combat the lack of economic opportunity among minority-owned businesses.

Finally, Congress specifically prohibited the Commission, in prescribing its competitive bidding regulations, from basing a finding of public interest solely or predominantly on the expectation of increased Federal revenues. Thus, any argument that optional use of a set-aside or a set of bidding credits will decrease the amount of revenue flowing to the U.S. Treasury has no place in the debate. Congress has determined that it is in the public interest to pursue economic opportunity for those businesses advantaged by a lack of capital and traditional access to capital.



STATEMENT OF
JOHN T. SPOTILA
GENERAL COUNSEL
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE
SMALL BUSINESS SUBCOMMITTEE
ON MINORITY ENTERPRISE, FINANCE
AND URBAN DEVELOPMENT
HOUSE OF REPRESENTATIVES
ON DISCRIMINATION IN TELECOMMUNICATIONS

May 20, 1994

Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify at your hearing on "Discrimination In Telecommunications." You asked the U.S. Small Business Administration (SBA) to address its recent proposal to repeal the opinion molder rule and the implication this will have for minority firms seeking credit in the media industry. You also asked us to provide data on the Agency's financial assistance to minority owned firms in the telecommunications industry from 1989 to 1994 and to provide statistics on the total number and size of firms owned and controlled by minorities operating in the telecommunications industry for the same time period.

Opinion Molder Rule

On April 5, 1994, the SBA published a proposed rule, that if adopted as a final regulation, will allow the Agency to provide financial assistance to small business owners engaged in the media industry. The comment period for this proposed rule ends today.

The SBA believes that it is timely to consider major substantive changes in the media policy rule. Under our present regulatory policy, no business loan may be made to an applicant engaged in the creation, origination, expression, dissemination, propagation or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form or content. Over the years, there have been several express

exceptions to this prohibition. As an example of these exceptions, we have made loans to commercial or job printers and publishers of shoppers newspapers if they consisted of only advertising material, without editorial, narrative or filler articles. Cable TV systems have been allowed to borrow from the SBA when they passively receive and transmit broadcast signals without selective judgements of programs transmitted. Any system that operates a live channel has been found to be ineligible.

We have also found general merchandise stores that sell books, magazines, newspapers, tapes, records, and general book or record stores that carry a wide variety of material to be eligible under the present rules. However, assistance is not available to specialty book or videotape stores which sell or rent items in a single or limited subject area. The rationale underlying the distinction between general and specialty stores has been that a general store covers a broad range of ideas, values and thoughts, rather than a particular or narrow set of ideas or values. At times, these distinctions have been very difficult to make.

Academic schools are ineligible, but technical, secretarial, vocational and trade schools have been eligible. Nursery, kindergarten and pre-schools have been eligible if they are not primarily engaged in teaching academic subjects.

This media policy was originally adopted by SBA in 1953 when the Agency was first created. The predecessor to the SBA, the Reconstruction Finance Agency, had a similar media policy rule.

There were several reasons for the media policy rule. First, the prohibition sought to avoid any possible accusation that the Government was attempting to control editorial freedom by subsidizing the media or communications for political or propaganda purposes. Second, the Agency has generally sought to avoid Government identification through its business assistance programs with concerns that might publish or produce matters of a religious or controversial nature. Finally, the SBA was concerned that the constitutionally protected rights of freedom of speech and press might otherwise be compromised either by the fear of Government reprisal or by the expectation of Government financial assistance.

The SBA no longer regards these fears as real concerns. In our view, they do not give rise to compelling reasons to deny necessary financial assistance to otherwise eligible small business concerns. Our mission at the SBA is to create jobs and promote economic development. This should be our focus in determining where financial assistance should be directed.

Many individual members of Congress have expressed concern with the substance of SBA's regulations in this area. Several

bills have been introduced to deal with the rule legislatively, although none have been enacted. Some of these bills are referred to in our Proposed Rules publication in the Federal Register.

The SBA is aware that small businesses in the media industry often have difficulty in raising capital or borrowing money. Interestingly, the media policy rule applicable to the financing of business loans has not been applicable to assistance provided by Small Business Investment Companies (SBICs), which are licensed by the SBA. Thus, SBICs are permitted to help businesses engaged in the media. The policy surrounding SBIC assistance to media concerns was similar to the approach taken by the Congress in funding broadcasting through the nonprofit Corporation for Public Broadcasting. The SBICs operate within SBA regulations, but their transactions with small companies are private arrangements which carry no SBA guaranty. Their funding comes from private, SBA and other nonprivate sources.

The SBA also has been making physical injury disaster loans to media concerns and academic schools since 1953, based on humanitarian grounds. The disaster loan program attempts to restore to an injured party that which was lost due to circumstances beyond its control. No distinction is made for eligibility purposes between media and non-media concerns for

physical disaster loans, but economic injury disaster loans are subject to the limitations of the media policy rule.

The SBA believes that the assistance it presently makes available under the exceptions to the current media policy rule and under the SBIC and Disaster Assistance programs are not sufficient to assist small businesses in the media industries, which are in need of increased aid. Accordingly, the SBA has proposed to repeal the present media policy rule to help make assistance available to creditworthy small businesses. It will be an open process subject to scrutiny by the public and the Congress.

By adopting the proposed rule, the SBA believes it will be better able to assist in bringing new opportunities for minority-owned and women-owned businesses. Adoption of the proposed rule will, among other things, allow media companies to invest in new infrastructure such as advanced television systems for broadcasters and digital compression technology for cable operators.

Although the Agency has not yet reviewed in depth each response from the public regarding our proposed rule, we can tell you at this point that the vast majority of responses support us adopting the rule. We expect to make our final decision on the rule change within the next 60 days.

SBA Financial Assistance

Attached to my statement for the record is a report on the SBA's 7(a) General Business Loan Guarantee approvals by ethnic code for small businesses in the telecommunications industry from Fiscal Year (FY) 1989 to date. The total number of loans has increased from 37 in 1989, to 65 in 1993 to 44 in FY 1994 to date. The total dollar amount guaranteed by the SBA, increased from \$5.8 million in FY 1989 to \$15.1 million in FY 1993. In FY 1994 to date, the total dollar amount is \$8.5 million.

Loan guarantees to minority owned businesses in the telecommunications industry for this time period were disappointing. For FY 1989, a total of eight loans were guaranteed and in FY 1993 this amount increased to 10 loan guarantees. As you know, increasing minority business participation in all programs and services is a major policy objective of this Administration, and increased participation by minorities is part of Administrator Bowles' performance contract with President Clinton and part of each District Director and Department Head's performance agreement with Administrator Bowles. This firm commitment combined with the repeal of the opinion molder rule will improve minority participation in the telecommunications industry.

[For a breakdown of the Standard Industrial Codes (SIC) used to develop this report, see the attached page from the Standard Industrial Code Manual for 1987].

Statistics on Minority Firms In Telecommunications

The SBA does not collect data on the number of minority firms in telecommunications. The Federal Communications Commission (FCC) has collected information on the number of minorities employed in the telecommunications industry. The National Telecommunications Information Administration (NTIA) has collected data on minority broadcast ownership interest. I understand Assistant Secretary Larry Irving of NTIA is also testifying on this panel and is providing more detailed information on this topic.

According to an analysis by NTIA, there are 11,021 broadcast stations licensed in the United States. Of those, only 300 are owned by minorities or approximately 2.7 percent. A complete chart of the statistics is attached.

Mr. Chairman, let me again thank you for the opportunity to appear before you today on this very important issue. I will be happy to answer any questions you may have.

BUSINESS LOAN APPROVALS
AS OF 04/30/94

16 MAY 1994
REF #: 940978

FISCAL YEAR	ETHNIC CODE	NO. LOANS	TOTAL AMOUNT	SBA AMOUNT
	0	1	0	0
88	2		100,000	90,000
89	3		405,164	304,648
89	4		0	0
89	6		0	0
89	7	29	6,421,992	5,419,002
		37	6,927,156	5,813,650
TOTAL FY:	89			
90	0	1	110,000	99,000
90	3	1	90,000	81,000
90	6	1	356,600	303,110
90	7	39	7,239,598	6,047,038
		42	7,796,198	6,530,148
TOTAL FY:	90			
91	0	1	561,000	418,800
91	2	1	17,000	17,000
91	3	1	136,000	15,000
91	6	2	825,000	682,500
91	7	32	6,298,381	5,079,399
		37	7,829,381	6,342,699
TOTAL FY:	91			
92	0	2	40,000	36,000
92	3	2	0	0
92	4	2	104,000	93,600
92	6	1	0	0
92	7	60	14,105,332	11,467,209
		67	14,249,332	11,596,809
TOTAL FY:	92			
93	0	3	361,000	322,880
93	1	2	65,000	61,000
93	2	2	125,000	31,600
93	3	4	1,016,600	844,872
93	4	55	16,746,295	13,734,674
		65	18,283,895	15,053,926
TOTAL FY:	93			
94	0	1	10,000	9,000
94	4	1	250,000	175,000
94	6	1	180,000	126,000
94	7	41	10,231,643	8,204,237
		44	10,671,643	8,514,237
TOTAL FY:	94			
OVERALL		292	65,757,605	53,851,489

Code **Racial/Ethnic Category**

0 **BLACK** - A person having origins in any of the black racial groups of Africa.

1 **WHITE** - A person of European origin, regardless of race.

2 **ASIAN** - A person having origins in any of the original peoples of North America, and who maintain cultural practices through tribal affiliations or community recognition.

3 **HISPANIC** (except those Puerto Rican) - A person of Mexican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

4 **ISLANDER** - A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

5 **ISLAND GROUPS** - This code shall be used only for ancestry persons in same partnership or enterprise membership agreement (through S) completed in the partnership or enterprise, but not previously used through S for each of these groups.

6 **Multi-ethnic category** - A person having origins in any of the original peoples of Alaska and American Islands.

7 **UNCLASSIFIED**

8 **MEXICAN** - A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

9 **ISLAND GROUPS** - This code shall be used only for ancestry persons in same partnership or enterprise membership agreement (through S) completed in the partnership or enterprise, but not previously used through S for each of these groups.

10 **Multi-ethnic category** - A person having origins in any of the original peoples of Alaska and American Islands.

This major group includes establishments furnishing point-to-point communications services, whether intended to be received aurally or visually, and radio and television broadcasting. This major group also includes establishments primarily engaged in providing paging and beeper services and those engaged in leasing telephone lines or other methods of telephone transmission, such as optical fiber lines and microwave or satellite facilities, and reselling the use of such methods to others. Establishments primarily engaged in furnishing telephone answering services are classified in Services, Industry 7389.

Industry
Group
No. No.

481 TELEPHONE COMMUNICATIONS

4812 Radiotelephone Communications

Establishments primarily engaged in providing two-way radiotelephone communications services, such as cellular telephone services. This industry also includes establishments primarily engaged in providing telephone paging and beeper services and those engaged in leasing telephone lines or other methods of telephone transmission, such as optical fiber lines and microwave or satellite facilities, and reselling the use of such methods to others. Establishments primarily engaged in furnishing telephone answering services are classified in Services, Industry 7389.

Beeper (radio pager) communications
services
Cellular telephone service

Pager services radiotelephone
services
Radiotelephone communications

4813 Telephone Communications, Except Radiotelephone

Establishments primarily engaged in furnishing telephone voice and data communications, except radiotelephone and telephone answering services. This industry also includes establishments primarily engaged in leasing telephone lines or other methods of telephone transmission, such as optical fiber lines and microwave or satellite facilities, and reselling the use of such methods to others. Establishments primarily engaged in furnishing radiotelephone communications are classified in Industry 4812, and those furnishing telephone answering services are classified in Services, Industry 7389.

Data telephone communications
Local telephone communications,
except radio telephone
Long distance telephone communi-
cations

Voice telephone communications,
except radio telephone

482

TELEGRAPH AND OTHER MESSAGE COMMUNICATIONS

4822 Telegraph and Other Message Communications

Establishments primarily engaged in furnishing telegraph and other nonvoiced message communications services, such as cablegram, electronic mail, and facsimile transmission services.

Cablegram services
Electronic mail services
Facsimile transmission services
Fulguram services
Phototelegraph services
Radio telegraph services

Telegram services
Telegraph cable services
Telegraph services
Teleprinter services
Title services

BROADCASTING STATIONS

4832 Radio Broadcasting Stations

Establishments primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Also included here are establishments primarily engaged in radio broadcasting and which produce radio program materials. Separate establishments primarily engaged in producing radio program materials are classified in Services, Industry 7322.

Radio broadcasting stations

4833 Television Broadcasting Stations

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified in Services, Industry 7812. Establishments primarily engaged in furnishing cable and other pay television services are classified in Industry 4841.

Television broadcasting stations

484

4841 CABLE AND OTHER PAY TELEVISION SERVICES

Cable and Other Pay Television Services

Establishments primarily engaged in the dissemination of visual and textual television programs, on a subscription or fee basis. Included in this industry are establishments which are primarily engaged in cablecasting and which also produce taped program materials. Separate establishments primarily engaged in producing taped television or motion picture program materials are classified in Services, Industry 7812.

Cable television services
Closed circuit television services
Multi-channel broadcast satellite (DBS) service
Multiple distribution systems (MDS) service

Satellite master antenna systems
SDM/TV service
Subscription television service

4899 COMMUNICATIONS SERVICES, NOT ELSEWHERE CLASSIFIED

Communications Services, Not Elsewhere Classified

Establishments primarily engaged in furnishing communications services, not elsewhere classified. Establishments primarily engaged in providing on-line information retrieval services on a contract or fee basis are classified in Services, Industry 7373.

Radio station operation
Radio transmitting operated by club
Satellite earth stations

Satellite or mobile tracking stations,
operated on a contract basis
Tracking machine by laboratory and
photography on a contract basis

group includes establishments furnishing point-to-point communications services to be received aurally or visually; and radio and television broadcasting group also includes establishments primarily engaged in providing paging services and those engaged in leasing telephone lines or other methods of telecommunication, such as optical fiber lines and microwave or satellite facilities, and related services to others. Establishments primarily engaged in furnishing telegraph services are classified in Services, Industry 7389.

TELEPHONE COMMUNICATIONS

Autotelephone Communications

Establishments primarily engaged in providing two-way radiotelephone communications services, such as cellular telephone services. This industry also includes establishments primarily engaged in providing telephone paging and pager services and those engaged in leasing telephone lines or other methods of telephone transmission, such as optical fiber lines and microwave or satellite facilities, and related services to others. Establishments primarily engaged in furnishing telephone answering services are classified in Services, Industry 7389.

Pager (radio pager) communications
Radiotelephone communications

Cellular telephone services

Telephone Communications, Except Radiotelephone

Establishments primarily engaged in furnishing telephone voice and data communications, except radiotelephone and telephone answering services. This industry also includes establishments primarily engaged in leasing telephone lines or other methods of telephone transmission, such as optical fiber lines and microwave or satellite facilities, and reselling the use of such methods to others. Establishments primarily engaged in furnishing radiotelephone communications are classified in Industry 4812, and those furnishing telephone answering services are classified in Services, Industry 7389.

Voicemail
Voice telephones
except radiotelephone

Data telephones communications
Local telephone communications,
except radiotelephone
Long distance telephone communications

TELEGRAPH AND OTHER MESSAGE COMMUNICATIONS

Telegraph and Other Message Communications

Establishments primarily engaged in furnishing telegraph and other message communications services, such as cablegram, electronic mail, facsimile transmission services.

Cablegram services
Electronic mail services
Facsimile transmission services
Phototelegraph services
Radio telegraph services

Telegram services
Telex services
Teletype services
Teletypewriter services
Toll services

**A STATISTICAL ANALYSIS OF MINORITY-OWNED COMMERCIAL BROADCAST
STATIONS LICENSED IN THE UNITED STATES IN 1993**

INDUSTRY TOTALS	BLACK	HISPANIC	ASIAN	NATIVE AMERICAN	MINORITY TOTALS
AM Stations 4,950	110 2.2%	63 1.3%	0 0%	2 0%	175 3.5%
FM Stations 4,920	71 1.4%	22 .4%	2 .0%	3 .1%	98 2.0%
TV Stations 1,151	19 1.7%	7 .6%	1 .1%	0 0%	27 2.3%
Cumulative Totals* 11,021	200 1.8%	92 .8%	3 0%	5 0%	300 2.7%

- Industry totals based on information from the Federal Communications Commission, Office of Public Affairs, August 31, 1993.
- All figures are rounded to the nearest tenth percent.

CRAIG A. WASHINGTON
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MAJORITY WHIP AT LARGE

VICE CHAIRMAN
DEMOCRATIC STUDY GROUP
EXECUTIVE COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515-4518

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CRIME AND CRIMINAL JUSTICE

COMMITTEE ON
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SUBCOMMITTEES
EMPLOYMENT, ENERGY AND NATURAL RESOURCES
HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS

Statement of
The Honorable Craig A. Washington (D-Texas)
Before the
Small Business Committee
Minority Enterprise, Finance and Urban Development
Subcommittee

Hearing on Discrimination in the
Telecommunications Industry

May 20, 1994

Dear Chairman Mfume, fellow Colleagues, witnesses, and friends,
thank you for inviting me to appear before you as a witness to this
most important hearing. Unfortunately, conflicts with previous
appointments will keep me away today. It is my hope that my written
remarks will suffice and make a positive contribution to the
official record on discrimination in the telecommunications
industry.

I would like to take a moment to comment upon Chairman Mfume's
commitment to the development, placement, and enhancement of
minority telecommunications professionals and their concomitant
business opportunities. Chairman Mfume is to be commended for his
tireless efforts to support and facilitate dialogue and movement on
such issues as the upward mobility of telecommunications
professionals, fairness in the telecommunications industry, and the
careful analysis, review and promotion of technological and

regulatory matters affecting the minority communities in which we live and work.

Twenty-five years ago, President Lyndon B. Johnson appointed the Kerner Commission to examine the causes of civil disturbances that shook this nation. The Commission said, in part: "The press has too long basked in a white world, looking out of it, if at all, with white men's eyes and a white perspective." The report stated that this was no longer good enough. In many ways, the Kerner Report, which was issued over two decades ago, produced a shock wave of expectation and smaller ripples of opportunities that partially opened the door of the powerful communications industry to people of color.

It is timely that this hearing is being held in the wake of the 40th anniversary of perhaps the most cataclysmic decision regarding discrimination in the United States -- the Brown v. the School Board of Topeka, Kansas. It seems as if the issue of "discrimination," an issue that we all thought was addressed with this case and with the 1964 Civil Rights Act, keeps coming back. In his article, The Rise and Fall of the Distress Sale (Broadcast Education Association, 1992), Mr. Alan G. Stavitsky shows that in 1977, the Congressional Black Caucus petitioned the Federal Communications Commission to increase minority ownership of broadcast facilities. Where are we today? Mr. Stavitsky points out that as of 1991, of 10,616 AM and FM radio stations and television stations, African Americans own 1.8

percent, Hispanic Americans own 0.8 percent, Asian Americans own 0.1 percent, and Native Americans own even less than 0.1 percent.

There is no doubt about the distance that minorities still must travel. If you had any doubts, just ask the 30 million black people who constitute 12% of the population if they are happy that they only own 1.8% of all the radio and television stations in the United States. Ask the 30 million black people if they are happy that they have only 4% of professional newsroom jobs. Ask the 30 million black people if they are happy that they will see an infinitesimal amount of the projected \$300 billion telecommunications industry.

The power of telecommunications is the power to help us learn more about the world and to bridge the gaps that separate our differences. In order to create this kind of future, we are going to need the collective talents and participation of all segments of the U.S. telecommunications industry -- the Bell companies, the cable industries, long distance companies, wireless companies, software companies, and the computer industry -- to make this affordable and accessible to everyone everywhere.

In 1968, 50 megahertz was opened up which prompted the creation of what is today a \$10 billion cellular industry. If only 50 megahertz resulted in a \$10 billion industry, how much more business will 150 megahertz give? This will, of course, spur robust economic growth by the commercial viability of the many exciting new

technologies which have been threatened by the lack of available useful spectrum.

I will not claim to know all there is to know about telecommunications issues. However, I do have good Texas sense. When H.R. 707, the Emerging Telecommunications Technologies Act came before me during full Energy and Commerce Committee consideration, I asked myself, using good Texas sense, "How many fiber optics companies are minority owned or controlled? How many minority cellular or paging facilities are owned by minorities? How many African American firms are doing business with or have joint ventures with telecommunications manufacturing entities? How many African American firms manufacture telecommunications equipment? As is usual with these issues, the answer is somewhere between "none" and "not enough."

This bill, needless to say, included stronger language for the participation of minorities and women upon its final consideration by the Energy and Commerce Committee. My CBC colleagues and I were successful in doing so. Some people will call this a hand out. I say it is a helping hand. You and I know that if your, say, paging business is not serving its customers, the market will terminate you. Once the door is opened, you must perform or all of the set-asides in the world will not work.

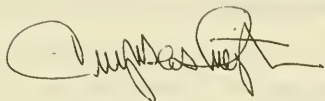
I have recently been informed that even these provisions for Personal Communication Services, which were passed into law as part

of President William J. Clinton's budget, are not being supported. This discrimination not only hurts African Americans, but all minorities, the disabled, and the aged, who have historically been unable to afford, avail themselves, or access the most modern and least expensive technologies.

I fully support the efforts of Chairman Mfume and of this subcommittee to include more people, qualified people, in the information superhighway. What good is an information superhighway if we, as minorities, the disabled, and the aged, cannot even get onto the entrance ramp? In their article, Communications Networks (The Futurist, January-February 1992), Scott Cunningham and Alan Porter state that one of the 11 ways that communications will affect the social fabric of the United States is by creating a new type of "information discrimination." They state that "the telecommunications revolution may be bad news for the poor and the uneducated" because the information poor "are limited in their access to occupations by a lack of information-manipulationskills."

We have the unique opportunity to prevent this from happening. We can, must, and should open the door of opportunity to all. Opening up PCS opportunities for all is of extreme importance to not just minorities, but for all Americans. I, along with my concerned colleagues, will do all that we can to ensure that participation and competition.

By allowing investment in PCS services, we invest in ourselves as minorities and as Americans. When you invest in yourself, in your past, and in your present, you invest in your future. I applaud Chairman Mfume for holding this most important hearing today, and I thank you for allowing me to submit this testimony.

A handwritten signature in black ink, appearing to be "C. M. Mfume", written in a cursive style.

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON
MINORITY ENTERPRISE, FINANCE AND URBAN DEVELOPMENT
HEARING ON

"DISCRIMINATION IN THE TELECOMMUNICATIONS INDUSTRY"

MAY 20, 1994

TESTIMONY OF

HERBERT P. WILKINS, SR.

Thank you Chairman Mfume and other member of the subcommittee for allowing me to appear before you today. My name is Herbert P. Wilkins, Sr. and I am president of W & J Management Company, Inc (W&J). W&J is the Investment Advisor for a group of minority owned venture capital funds, Syndicated Communications, Inc., Syncom Capital Corporation (a 301d SSBIC), and Syndicated Communications Venture Partners II, L. P., a Limited Partnership (all herein after collectively referred as "Syncom" or the "Syncom Funds") The investors and limited partners of the Syncom Funds are well known institutional investors. I have attached a copy of a corporate brochure which more fully describes the Syncom Funds.

Syncom was formed in 1977, with initial capital of \$1.750 million. Its investors sought to address the historic shortage of capital in the African American community needed to support the acquisition of broadcast stations by Black owned concerns. Since its inception, Syncom has financed over seventy (70) minority owned and/or controlled concerns. These concerns are all involved in the telecommunications industry. The Syncom Funds now have over \$63 million dollars of invested capital under management.

Syncom has financed a significant number of the radio stations owned by African and Latino Americans. In fact, of the seventy seven FM stations presently owned by African Americans in the U.S., a large number were financed by Syncom. Further, Syncom has participated in the financing of many of the Latino owned stations. Syncom has also financed a significant number of cable systems that are either minority owned and or have significant minority participation in their ownership structure. In addition, Syncom has also financed minority owned concerns involved in non-broadcast services, print media, etc.

During the years of Syncom's involvement in financing minority ownership of telecommunications concerns, it has found that the greatest opportunity to generate and realize the wealth created from the appreciation in the value of telecommunications assets almost always accrues to the initial owners of a communications license! Undoubtedly, the same will

hold true for the winners of the new PCS licenses. Therefore, the ability to participate in the auction process with sufficient capital to win is critical to a minority concern's future success in the PCS industry. Without capital, or a set-aside or some other form of preference, a minority concern has no chance of winning in the auction.

Future ownership by minorities of licenses is critical to the actual involvement of minorities in employment positions as managers and technicians in newly licensed PCS concerns. Through research, it has been conclusively proven that when a concern is minority owned, irrespective of location, minorities constitute the largest percentage of the workforce. When a concern is majority owned the largest percentage of the workforce, is comprised of persons from the majority population. The PCS industry and the Information Super Highway in general, will be responsible for much of the future employment growth in our economy. If minorities don't own these concerns, then not enough minorities will be employed in this critical new industry to make a difference in the high level of unemployment the minority community suffers today. Moreover, ownership of a small equity position and/or a non-controlling position in a joint venture, does not provide a practical alternative to the employment benefits of full ownership. Control and ownership is the only way to insure high levels of service to minority communities as well as the employment of minority persons in significant numbers in the PCS industry.

If the FCC allows only a preference, there can be no assurance that a minority owned PCS licensee will be produced as a result of the FCC's auction and licensing process. And if the auction process does not contain a set-aside, almost no totally minority owned licenses will come out of this strategically critical proceeding. Without a set-aside, instead of achieving access to the Information Super Highway, minorities will be relegated to the back alleys and side roads of continued educational and economic impoverishment.

The FCC has used the set-aside process before, for wireline companies in the award of cellular licenses. Only the wireline companies were allowed to compete for one half of the

spectrum awarded in that administrative licensing proceeding. As a result of the wireline companies' collective success in getting that set-aside, the wireline companies are now able to use the cashflow from those free licenses (they paid no fee) as their preference in the upcoming PCS/PCN auction. If the wireline telephone companies were given set-asides in the past, why can't the same type set-aside be provided to minorities now?

Since the wireline companies got their set-aside, shouldn't the minority community be able to get a set-aside in this proceeding? Is the FCC so afraid of a court challenge to a minority set-aside that it is willing to risk the prospect of no future minority ownership of a PCS license? Wasn't there also a court challenge to the original wireline set-aside that failed? Clearly the stakes are so high, that the prospect of such a court challenge is of minimal risk as compared to the prospect of the minority community being excluded from ownership of PCS/PCN licenses. These licenses are extremely critical to the future economic and employment viability of minority communities across this nation.

"Headstart" is a well known term. Everyone involved in wireless communications knows that with a headstart in most services, market share advantage and operating profitability is almost a certainty. Clearly the wireline companies with their cellular licenses, received for the price of submitting their applications in their set-aside licensing proceeding, know what "headstart" means. It is precisely their "headstart" which has given the majority owned companies the ability and financial strength, created primarily during the years when minorities were effectively barred from ownership, to now block the entry of new minority-owned telecommunications companies. Without a minority set-aside, the FCC's proposed auction process will further reinforce and solidify this unfair and nationally damaging imbalance.

Surely the Washington Post and Cox Broadcasting through their "Pioneer Preference" license awards, know what "headstart" means. Great strategic positioning has been conferred on these two, Fortune 500, women owned concerns, because of the award of PCS licenses to these companies in some markets which have the largest minority populations in the U.S.. With the

award of the Pioneer Preference license issued for the New York city MTA, minorities will be forced to bid more for the remaining licenses because of the scarcity of licenses created by these same FCC awards. Because of these awards, the number of licenses available for auction in these markets has been reduced. Moreover, minority companies will now find it more difficult to obtain PCS licenses because competing majority companies will bid up prices using their financial headstarts. The Pioneer Preference awards in the very markets with the largest concentration of minority group persons is of particular concern because it is where most minority companies would target their auction bids. Because of the FCC's actions in awarding these market PCS licenses, it is these particular markets where minorities should have a license set-aside exclusively for them. The minority community, is struggling to get the pocket change for the toll to get onto the Information Super Highway and the FCC must provide more help than its proposed preferences. Without a set-aside, one would have to conclude that the FCC has used its control of the process to insure the continued economic imperialism of the majority over the minority, by making it almost impossible for minorities to own PCS licenses in the markets where we are the majority of the population.

The award of pioneer preferences to the Washington Post and Cox Broadcasting along with their prior free broadcast license awards, gives those concerns and other majority owned companies such a great experience and the financial headstart, that their headstart can now be used as majority company preferences in the PCS/PCN auction. The majority concern's pseudo preferences, were gained at a time when African Americans could not enter the FCC's office building, unless it was through the back door. In short, because minorities were excluded from competition with these same majority concerns, these concerns have had a decades long headstart and, therefore, will have a strategic advantage in the auction.

The question now must be asked, is the press co-opted? Is it now a supporter of the process which appears to deny fairness to minority concerns seeking to obtain PCS/PCN licenses? Without access to the capital needed for the auction and a truly meaningful

preference, can fairness be said to exist in the present FCC auction licensing process? Clearly, only a set-aside gives a real chance for minorities in the auction. With no press organ airing the issues and commenting on the inherent unfairness of the auction process to minority concerns, how can the minority community feel anything other than intimidated by the process?

The exclusion of minorities from initial ownership of PCS licenses can mean little or no service to minority communities. And conversely, the inclusion of minorities as initial owners of PCS will substantially accelerate the provision of services to minority communities. An examination of the development of urban cable T.V. franchises illustrate this fact. That is a fact born out by developments in the franchising of cable T.V.. For example, in the history of cable in New York City, where much of the South Bronx and Brooklyn still remain unwired and Harlem didn't receive service until well after the rest of Manhattan, only Queens, where a minority firm has the franchise, stands out as an area where full service came early to a minority community. South Central L. A. was one of the last sections of the city of Los Angeles to receive cable service. Yet, East Los Angeles, a Latino community, had full cable service by 1983 because the franchise holder is a Latino owned company. The city of Cleveland just brought cable service online several years ago, but the adjacent city of East Cleveland, Ohio had cable service almost five years sooner because its franchise owner was a African American owned company. Generally, in the development of communications services, minority communities get served last because the majority owned companies that receive the license or franchise, and thereby control the delivery of service, feel that greater and more readily achieved economic benefit and opportunity results by first developing service in the majority communities. The same type phenomenon can be observed to be happening now in PCS by reviewing the recent past announcements made by the major communications companies for the location of new fiberoptic/coax construction (Information Super Highway). None has proposed such super highway construction for any minority community.

Without a set-aside to achieve minority owned licenses in PCS, Americas' minority

communities will not be served by majority companies until well after all other communities have been served. Again, by not establishing set-asides, at least in areas where there are large concentrations of minority persons, the FCC has relegated the minority community to the back alleys and side roads of educational and economic impoverishment, instead of equitable participation in the construction and ownership of the National Information Super Highway.



Congressional Caucus for Women's Issues

WOMEN BUSINESS OWNERS

October 1992

The number of women-owned businesses in the United States has increased dramatically in recent years. Today, there are about six million women-owned businesses, roughly three and a half million more than in 1982. (National Women's Business Council, 1991). Businesses owned by women constitute one of the fastest growing sectors of the American economy, with women starting businesses at a rate twice that of men. (Small Business Administration, 1991).

- 32 percent of all small businesses are owned by women (SBA, 1991)
- 13.9 percent of all public or "C" corporations are owned by women (SBA, 1991)
- The Small Business Administration has predicted that, by the year 2000, 40 percent of all small businesses will be owned by women.

Women-owned businesses are spread throughout every sector of the economy, including venture capital, construction, manufacturing, mining, and finance. Three-fifths of businesses owned by women are, however, concentrated in the less profitable service and retail industries. More than 50 percent of all women-owned businesses are service companies and nearly 20 percent are retail industries. In contrast, only about 7 percent of the companies women own are in the areas of construction, manufacturing, and wholesale trade. ("A Status Report to Congress: Statistical Information on Women in Business," Small Business Administration, December 1990).

This uneven distribution is one reason why women-owned businesses accrue only about 14 percent of total business revenue while constituting nearly a third of all small businesses. ("Second Annual Report to the President and Congress," National Women's Business Council, 1990).

However, recent evidence suggests that women are beginning to make significant progress in nontraditional areas. Between 1982 and 1987, women increased their ownership of all construction businesses from 4.7 percent to 5.7 percent. Similarly, women increased their share of all manufacturing businesses from 15.8 percent in 1982 to 21.7 percent in 1987. (Census Bureau, 1991).

A brief examination of the information available on women-owned businesses in the U.S. indicates that these enterprises are highly successful. Fewer than one in four women-owned businesses failed during a recent five year study despite a national failure rate of 60 percent in the first six years of business ownership. (NWBC, 1990). Moreover, women-owned businesses are responsible for a significant portion of our national income.

- Gross receipts from women-owned businesses were \$278.1 billion in 1987 (NWBC, 1990).
- 6.5 percent of corporate receipts, totaling approximately \$200 billion, were accrued by women-owned "C" corporations in 1987 (SBA, 1991).

- The annual receipts of women-owned businesses are greater than those of any single state in the nation (SBA, 1991)

Despite successes, there are still many barriers standing in the way of women business owners in the United States, particularly in the areas of credit and federal procurement. These barriers must be addressed in the near future if we are to provide women with equal opportunity in the business world and ensure the health of our nation's economy. Given the large contributions women-owned businesses are making in today's marketplace, the well-being of our economy depends in many ways on fostering the growth of these vital economic resources.

OBSTACLES FACED BY WOMEN BUSINESS OWNERS

Obtaining Commercial Credit

Among the greatest obstacles faced by women entrepreneurs is obtaining the necessary credit to start or expand their ventures. A recent study by the National Foundation for Women Business Owners (NFWBO) found that 76 percent of their members had to rely at least in part on personal capital to finance their business start-ups and that 38 percent lack commercial credit entirely.

The difficulties women have obtaining credit stem primarily from two factors. First, women tend to own the types of businesses that banks and other lenders are least likely to finance. Second, women face sexual discrimination in commercial lending.

In general, securing capital for small businesses is extremely difficult. This problem is most acute when the businesses seeking credit lack hard assets. According to a 1990 report by the National Women's Business Council (NWBC), because women have traditionally owned companies with the softest assets -- service, retail, and wholesale businesses -- they have a disproportionate amount of difficulty acquiring credit.

Other businesses that have unusual difficulty obtaining credit are microenterprises -- loosely defined, these are for-profit companies that have five or fewer employees and require little initial capital. A large number of women-owned businesses are microenterprises.

- At least one study has found that 70 percent of the businesses started by women involve less than \$10,000 in capital, and over 50 percent involve less than \$5,000. (Testimony of Ron Phillips, President of Coastal Enterprises Inc., before the House Committee on Small Business, May 6, 1991).

Because investment in microenterprises usually offers a comparatively low rate of return, creditors are often reluctant to dedicate their resources to financing them. Most traditional lending institutions refuse to make business loans for under \$50,000. This is particularly problematic for women business owners, who are starting microenterprises at a rate three times that of men, according to some estimates.

A related problem involves women who wish to establish a microenterprise but are currently receiving public assistance. Under current law, it is impossible for women receiving welfare to obtain business start-up loans without having their benefits terminated. This is because all personal assets,

including loans, are used to determine a person's financial eligibility for government assistance, regardless of whether the loan is to be used for business, rather than personal reasons. As a result, women who might otherwise be able to climb out of poverty by starting their own businesses are unable to do so because of the immediate loss of benefits.

A second factor thwarting women's access to credit is sexual discrimination. Despite the Equal Credit Opportunity Act of 1974, women continue to have more difficulty obtaining credit than men simply because they are women. *Time* magazine reported as recently as 1988 that "a surprising number of bankers remain skeptical that women can successfully run any kind of company, regardless of experience or credit history." In fact, "many banks will not extend commercial loans to women unless their husbands or other men in the family co-sign the application."

- The 1990 NFWBO survey found that 17 percent of their members had to provide their husbands' signatures in order to gain access to credit.

In addition to these problems, there is evidence that gaining access to credit is becoming even more difficult for women in the 1990's because of a general economic decline. While all small businesses are hurt by the recession and credit crunch, women-owned businesses take a disproportionately large beating because of their concentration in the economically volatile service sector.

Access to Federal Procurement Contracts

Another major problem area for women business owners is federal procurement. The U.S. government is the world's largest buyer of goods and services. Each year, it contracts billions of dollars out to businesses, but women are rarely the recipients of these lucrative agreements.

- In 1990, only 1.3 percent of the nearly \$178 billion in federal contracts was awarded to women-owned businesses. (Office of Women's Business Ownership, 1991). While this was a significant increase over 1980, when only about one third of one percent of such contracts went to women, it is far short of where women need and deserve to be.

Women attempting to contract with the federal government face several obstacles. First, the costs of dealing with the government can be prohibitive for small organizations operating on limited assets. Because the federal government is slow to pay its bills and financing costs are not recoverable under government regulations, business owners frequently need temporary financing to participate in the procurement system. The 1990 membership survey conducted by NFWBO revealed that 14 percent of respondents found the length of payment turn-around to be a significant barrier to doing business with the federal government.

A second significant obstacle faced by women business-owners participating in the procurement system is that many are dealing with the federal government for the first time. Their businesses have neither the track record nor the understanding of the procurement process within federal agencies to facilitate favorable contract award decisions. The recent NFWBO survey found that 13 percent of their members felt their unfamiliarity with the government impaired their efforts to obtain federal procurement contracts. Anecdotal evidence also indicates that many federal procurement officers are reluctant to contract with women business owners and provide them with little assistance.

A third problem women encounter in the procurement process is surety bonding. Most public works require the contractor to be bonded by a third party to protect taxpayer dollars from contractor default. However, because women often lack experience and capital and face sex discrimination, they may have more trouble obtaining these bonds than other business owners.

Unfortunately, the federal government has done little to aid women business owners in obtaining procurement contracts. No government-wide program specifically designed to assist women in obtaining federal contracts exists. An Executive Order signed by President Carter in 1979 established the Office of Women's Business Ownership at SBA and directed that federal agencies take steps to increase procurement opportunities for women. However, the Office of Women's Business Ownership reports that, in the absence of any specific laws, many agencies are reluctant to set goals for procuring with women-owned businesses.

The situation for women business owners is markedly different from that for minority-owned businesses, which are classified as "socially and economically disadvantaged businesses." The Small Business Act requires every federal agency to establish goals for contracting and subcontracting with minority-owned businesses. In 1988, that law was amended to establish a five percent government-wide contracting goal.

Minority business owners also have access to the 8(a) program, which permits socially and economically disadvantaged businesses to bid for federal contracts without competition. While technically the law also permits nonminority women business owners who can prove they are socially and economically disadvantaged to participate in the 8(a) program, in reality few women have ever been admitted to the program. Only 16 nonminority women have ever been certified under 8(a). In addition, of the 3,660 businesses that have been certified, only 424 have been owned by minority women. (Government Accounting Office, 1991).

The effect of these laws assisting minority-owned businesses has been to dramatically increase their procurement opportunities. Such businesses in 1989 obtained 4.8 percent of all federal procurement contracts.

A handful of legislation does require that assistance be given to women business owners. The Department of Transportation is required by law to set aside a total of 10 percent of surface transportation funds and airport improvement funds for women- and minority-owned businesses. Ten percent of contracts financed by the Agency for International Development (AID) for development assistance are also set aside for women- and minority-owned businesses, as are 10 percent of Energy Department funds for the development, construction and operation of the Superconducting Supercollider. The Environmental Protection Agency (EPA) is required to set-aside 8 percent and 10 percent, respectively, of contracts for wastewater treatment and clean air research to women- and minority-owned businesses. Most recently, Congress approved legislation requiring the Resolution Trust Corporation to establish a goal for participation of women- and minority-owned businesses and giving such businesses a bonus in evaluating their contract proposals.

While such programs have provided needed assistance to women business owners, a broader effort is needed if women are to overcome the plethora of barriers currently excluding them from the procurement system.

**REPORT OF
THE SMALL BUSINESS ADVISORY COMMITTEE
TO THE
FEDERAL COMMUNICATIONS COMMISSION
REGARDING GEN DOCKET 90-314**

SEPTEMBER 15, 1993

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EXECUTIVE SUMMARY

In order to assess the policy implications of General Docket 90-314, the FCC Small Business Advisory Committee (SBAC) held hearings in Washington, D.C. on May 27, 1993 and September 14, 1993. The Committee elicited testimony from industry leaders and other interested parties. Our findings and recommendations are summarized below.

Findings

- o Entry opportunities for small service providers have been constrained in existing telecommunications markets by undercapitalization, concentration of ownership, and other conditions contributing to the exclusion of businesses owned by minorities and women.
- o Capital formation is one of the major economic barriers to full participation by small and minority owned businesses.
- o The FCC can make these barriers surmountable through its crafting of interlinking policies which affect the amount of cash required based on (1) the amount of spectrum bid, and (2) the size of the licenses. Additional measures including bidding enhancements and tax expenditure finance assistance are appropriate regulatory tools to ensure that the public receives the best practical service from emerging PCS technologies, and to increase economic opportunities in the PCS field.

RecommendationsRegulatory Proposals

- o Service area designations and bandwidth assignments should attempt to remove significant impediments to entrepreneurial entry in the PCS field that could accompany a system of licensing based on competitive bidding.
 - Allocate a spectrum block for qualified small, female and minority businesses;
 - Allocate small spectrum blocks, e.g., 20 Mhz-25 Mhz per license;
 - Provide for multiple licenses in each geographic area.
 - Allow for an exemption to any proposed spectrum caps in a market where a joint venture exists with a small, female or minority business.
- o The Commission should encourage innovative and efficient service proposals by designing bidding methodologies, and supporting policies, to encourage entry opportunities and capital formation:
 - Use eligibility requirements for bidding designed to encourage equal employment opportunities, opportunities for minority and female vendors, and formation of strategic small business alliances with large LECs and cellular operators.
 - Allow applicants to certify financial qualifications based on "highly confident" letter and letters of intent from qualified investment banking firms, venture capital funds and Specialized Small Business Investment Companies.
 - Encourage strategic small business alliances generally by awarding "innovator's bidding credits" equal to 10% of an applicants bid.
 - Allow installment payments and royalty arrangements for qualified small, female and minority businesses.
 - Authorize distress sales to small business entities where winning bidders are ineligible unqualified, unable to pay, or unable to complete construct requirements.

- Seek legislation establishing a communications capital fund from revenues generated by spectrum auctions.
- o The Commission should also authorize use of tax certificate and other financing techniques, in consultation with the SBA and the IRS, to encourage capital formation:
 - Fixed microwave licensees seeking tax certificates for relocation.
 - SBA licensed Specialized Small Business Investment Companies that furnish financial and technical assistance to small PCS licensees owned by members of minority groups, women and disadvantaged rural entities.
 - Owners and investors in minority owned and controlled PCS licensees.

Classification Standards

- o The criteria for small, female, and minority business standards should be consistent with the Small Business Administration's (SBA) current standards for small and minority business concerns applying for financial and or management assistance from Small Business Investment Companies (SBIC) under the SBIC program.
- o The Commission should request comment from the public, after consulting with the SBA, to determine complementary eligibility standards for PCS capital formation policies.
- o Minority and female controlled entities should be subject to anti-trafficking requirements, should maintain 51% equity and voting control from the initial grant through construction and operation of the PCS license.

MARKET OVERVIEW

Our review of existing radiotelephone industries confirmed that the universe of potential service providers is significantly constrained by increasing concentration of ownership and undercapitalization. In our view, the introduction of competitive bidding procedures is more likely to compound, rather than relax, these impediments to market entry.

Need for Economic Opportunity

Economic opportunities for rural telephone companies, omnibus businesses owned by members of minority groups and women are major policy objectives of the Budget Reconciliation Act of 1993.¹ The legislative history of the Act indicates that the House Committee on Energy and Commerce was generally concerned that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." (emphasis added) Following the Committee's initial concerns with small business generally, concerns arose that specific provisions were needed to "ensure that businesses owned by members of minority groups and women are not in any way excluded." The House Report goes on to state that the "Committee anticipates that in some instances the Commission will act in a manner that is comparable to a mortgage banker, who designs new mortgage instruments in order to increase the universe of people who can afford to buy homes."² (emphasis added) Senate-sponsored amendments later reflected similar concerns with respect to rural telephone companies. Thus, the economic opportunity provisions invite reference to the distinct public interests in disseminating licenses among a wide variety of applicants in the future to avoid excessive concentration of ownership,³ and preempting exclusion of minorities and women from communications

1 Pub. Law 103-66, Title VI, 107 stat. 312.

2 Id., at p. 9.

3 The District Court for the District of Columbia recognized that avoidance of concentration of ownership initially justified efforts to encourage small business growth in electronic publishing through line of business restrictions under the AT&T consent decree. United States v. AT&T, 552 F. Supp. 131, 183 (D.C.D.C. 1983). The Commission has also invoked the public interest in intermodal competition and new and expanded telecommunications service to justify inclusionary ownership policies for satellite transponders and earth stations. World Communications, Inc. v. FCC, 735 F. 2d 1465, 1475 (D.C. Cir. 1984) (transponder sales) (1934 Act arms FCC with "elastic powers to accommodate dynamic new developments in the field of communications"); TRT Telecommunications v. FCC, 876 F. 2d 134 (D.C. Cir. 1989) (earth stations).

ownership.

Barriers To Market Entry

While uncertainty exists about the precise economic impact of the future PCS market structure, based on our findings, we are concerned that existing investment policies and practices, concentration of ownership, and undercapitalization, pose a serious risk that competitive bidding for spectrum will unduly burden, and in some cases foreclose, entry opportunities for small service providers.

Investment Trends

Although the precise economic impact of the future PCS marketplace is difficult to predict, it is widely accepted that the "primary obstacle to new entrants is lack of capital ..."⁴ According to a recent NTIA study, taxation of capital gains is a major contributor to the high cost of capital for U.S. telecommunications firms.⁵ The United States is the only major industrialized country that neither provides any capital gains tax relief or relief from double taxation of corporate profits. For this reason, some conclude that the internal revenue code "penalizes equity investment to a greater extent than any of our foreign rivals." The decline in capital available to small start-up firms following the passage of the 1986 Tax Reform Act, which raised capital gains tax rates by 40%, dramatically illustrates the adverse effect of current tax policy on small business investment. Between 1986 and 1991, the amount of venture capital made available to start new companies fell from \$4.19 billion to \$1.41 billion - a two thirds decline in financing for small business. During the same period, the number of start-up firms financed with venture capital dropped from 1,512 in 1986 to 792 in 1991.⁶

Debt financing practices among institutional lenders have also been cited as a cause of debt capital unavailability to small entities, including small FCC regulatees. Acquisition and operation of regulated communications facilities is extremely capital intensive. Without a track record of ownership

4 Statement of Barry Pineles, Assistant Chief Counsel for Market Competition Before the FCC Small Business Advisory Committee, May 27, 1993, p. 6.

5 U.S. Department of Commerce, Telecommunications in a Global Economy: Competitiveness at the Crossroads, Washington, D.C., (1990), p. 29.

6 McArdle, "Can Gov't Afford Cap Gains Hike?" Investor's Business Daily, July 22, 1993, p. 1, 2.

and substantial capital resources, new entrants typically encounter difficulties obtaining start-up funds. Lenders are frequently reluctant to finance loans, even when applicants have a track record since FCC licenses cannot be used for collateral. Lenders also prefer to work with multiple-property owners.

Concentration of Ownership

Recent market trends in the existing radiotelephone industry suggest a trend toward concentration of ownership. SBA sales and employment data shows that a significant decline in the total number of firms in the radiotelephone industry coincided with declines in sales and employment shares among radiotelephone operators with less than 249 employees between 1989 and 1991. Of a total of 990 firms in SIC Code 481 in 1989, 971 firms with 249 employees or less possessed a 35.1 percent cumulative market share in 1991, compared to 927 firms in the same employment size range with a cumulative market share of 52.5 percent in 1989. In contrast, there were a total of 19 firms with over 249 employees commanding a 64.9 percent cumulative market share in 1991, compared to 21 firms of the same size range with a cumulative market share of 47.5 percent in 1989. SBA data on employment growth patterns shows that employment decreases due to firm "deaths" exceeded employment increases due to firm "births." We interpret data concerning firm "deaths" to mean that contraction among firms with less than 249 employees is due in part to attrition, and is not entirely explained by consolidation of ownership in the radiotelephone industry.

Racial and Gender Disadvantage

Women and members of minority groups have encountered special barriers to telecommunications ownership.⁷ At a time when women are becoming a major force in the world of small business generally, significant disparities between female ownership in telecommunications and the general economy persist. Between 1982 and 1987, the number of women owned proprietorships, partnerships, and Subchapter S corporations rose from 2,612,621 to 4,112,787, an increase of about 58% compared to a 26.2 percent increase among small businesses generally. In addition, total receipts of women owned businesses nearly tripled over this period -- rising from \$98.3 billion in

7 Letter of Hon. Larry Irving, Asst. Sec. for Communications and Information, to Hon. James H. Quello, Acting Chairman, FCC, September 14, 1993. ("We encourage the Commission to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by groups currently underrepresented in telecommunications industries").

1982 to \$278.1 billion in 1987, compared to a 55% increase among small businesses as a whole during the same period. The Census Bureau's Survey of Women owned businesses showed that 30% of U.S. businesses were owned by women. The industry subgroup containing transportation, communications, and public utilities, however, accounted for only 1.9% of the women owned firms.⁸

The advocacy group American Women in Radio and Television suggests that lack of financing may account for the disparities between the percentage of communications businesses owned by women and the percentage of all businesses owned by women. "No existing FCC policy provides an incentive for women to enter the [communications] business. Nor are there any small business investment companies operating to assist women..."⁹ In view of the disparity between the statistical profile of businesses owned by women in telecommunications and the profile of women in other areas of the economy, we believe the lack of telecommunications-specific financial and technical assistance should be considered significant impediment to market entry.

Businesses owned by minorities also face special problems. A recent study by the U.S. Minority Business Development Agency found minority firms represent only 0.5 percent of all firms in SIC Code 4812 and 4813 combined.¹⁰ In that study, moreover, researchers found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services, while only 11 minority firms in SIC Code 5065 distribute cellular equipment.

The factors that have precluded minorities from effective participation in ownership of radio facilities involve access to finance, but are difficult to isolate or quantify. Dr. JoAnn Anderson, Director of NTIA's Minority Telecommunications Development Program, testified at our May hearing that there are often similarities between small businesses and minority businesses indicating that capital access is a problem for small businesses across the board, but "minorities will have additional

8 Letter of Melodie Virtue, Vice President Government relations, American Women in Television and Radio, August 6, 1993.

9 Comments of AWRT in MM Docket 91-140, pp. 2, 8 (citing The State of Small Business: A Report to the President, 1991).

10 Market Analysis of the Telecommunications Industry - Opportunities for Minority Businesses. U.S. Minority Business Development Agency: Washington, D.C. (1991)

problems." One additional problem is that minorities frequently do not or cannot use traditional sources of financing, and that the most frequent source of capital is family savings and friends.¹¹ Another problem noted by the U.S. Senate is that spectrum for radio facilities was first allocated at a time when "undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation."¹² Thus, through no fault of their own, minorities were impeded from competing successfully for licenses when they were first awarded and as they became available in the market due to systemic barriers to technical training and employment opportunities.¹⁴

Consequences of Spectrum Malapportionment

Burdens on small business entry poses a risk of spectrum malapportionment that could significantly limit the value of PCS spectrum to society as a whole. While companies of all sizes are potential contributors to innovation and efficiency, many technological advances in recent years have been introduced by small firms and new entrants. For instance, 55 percent of all technological innovations are attributable to firms with less than 500 employees.¹⁵ Studies have also shown that small firms innovate at a per person rate twice that of large firms, spend more on research and development, and translate research and development spending into new products more efficiently than large firms.¹⁶ In addition, "[s]mall businesses were responsible for 33.1 percent of employment and 45.7 percent of the growth in the communications sector from 1986-1988, and accounted for 90 percent of all new jobs created in fiscal year 1990."¹⁷ Nontechnical innovation and efficiency also

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- 11 Statement of JoAnn Anderson, PhD. Before the FCC Small Business Advisory Committee, May 27, 1993.
- 12 Anderson, *supra*, note 8.
- 13 Brief of the U.S. Senate As Amicus Curiae in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), p. 32, 33.
- 14 See, Telecommunications Minority Assistance Program, 1978 Pub. Papers 253 (President Carter).
- 15 "Characterizations of Innovations Introduced on the U.S. market in 1982," U.S. Small Business Administration.
- 16 Joint Petition for Further Rulemaking of Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc., in Gen. Docket 90-314, Exhibit #3, pp. 12, 13.
- 17 Statement of PCS Action, Inc. Submitted to the FCC Small Business Advisory Committee, May 27, 1993, p. 1.

appears to vary with ownership and control factors. The Congressional Research Service found that, compared to stations with no minority ownership, most radio stations in which members of minority groups hold an interest provide services designed to meet the needs of a diverse array of consumer groups including women, children, senior citizens, and foreign language groups.¹⁸ Thus, underrepresentation or exclusion of applicants likely to introduce innovative and efficient service has direct implications for small businesses and residential consumers who seek expanded communications capabilities offered by PCS technologies.

Some have argued that the productivity and competitiveness of the nation's citizens and small businesses are severely limited by inferior telecommunications capabilities.¹⁹ Unlike large business users, small and medium sized users frequently lack in-house managers, advanced telecommunications equipment and service options, redundant telecommunications capabilities during disasters and outages, and the inability to collect proprietary information about calling patterns. Critics also allege that these inferior telecommunications capabilities are in part the result of certain tariff restrictions imposed by LECs, and other 'use' and 'user' restrictions, that arbitrarily prevent small businesses from establishing sharing arrangements to achieve volumes and economies of scale enjoyed by larger businesses. Residential communities also have specialized needs. Possible consumer uses for PCS include personal emergency situations, routine point-to-point communications,²⁰ transmission of medical data, and dissemination of news, information services, and educational materials. Rural populations may also benefit from use of PCS technologies for mobile emergency and activities, farming applications, and rural community hospitals and clinics.²¹ Based on available data, we believe a universe of service providers that utilizes small businesses is most likely to meet these specialized needs of small businesses and residential consumers effectively and efficiently.

DISCUSSION OF REGULATORY PROPOSALS

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- 18 CRS, Minority Broadcast Station Ownership and Broadcast Programming: Is there a Nexus? (June 29, 1988).
- 19 Gorosh, Steve, Small Business, Telecommunications, and Economic Development, California Western Law Review, Spring 1993.
- 20 Barrett and Marchant, Emerging Technologies and Personal Communications Services: Regulatory Issues, Commlaw Conspectus Vol. 1, p. 7.
- 21 CTIA White Paper #7: For Small Business, PCS is a Big Deal, September 8, 1993, p. 3.

Overview

One major challenge remaining before the Commission in Docket 90-314 is the task of implementing the economic opportunity provisions of the Budget Reconciliation Act. In this section of our report, we discuss specific proposals for implementing economic opportunity safeguards. In general, our recommendations seek to promote capital formation and entry opportunities through allocation of local spectrum blocks for small business applicants, size conscious bidding methodologies, and a PCS tax certificate program.

Prior to the passage of the Act in August, the Commission adopted a First Report and Order concerning eligibility criteria, service areas, and spectrum allocation for narrowband PCS, which represents an important first step in bringing PCS technologies to the marketplace. The First Report and Order²² will create 5,500 new licensing opportunities for national, regional, and local narrowband PCS providers, including licensing opportunities for small business at the local level, and ancillary marketing and equipment manufacturing opportunities. The Act opens the door to more pro-active steps along these lines by providing the Commission with explicit authority to promote economic opportunity.

Under the Act, the Commission has several means to promote the public interest in the use of spectrum and encourage economic opportunity, competition, and new and expanded telecommunications services. The overriding purpose of the Act is to improve licensing and spectrum allocation by authorizing competitive bidding procedures with safeguards to protect the public interest in the use of spectrum. The text of the Act plainly contemplates that safeguards in the form of small business ownership regulations that further economic opportunity. First, the Act directs the Commission to design competitive bidding procedures that will avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants. 47 U.S.C. 309(j)(3). The Act further directs the Commission to prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants. 47 U.S.C. 309(j)(4)(C). Finally, the Act directs the Commission to consider the use of tax certificates, bidding preferences, and other procedures to ensure that small businesses are given opportunities to participate in providing spectrum based services. 47 U.S.C. 309(j)(4)(D).

22 GEN. Docket No. 90-314 58 FR 42681 (August 11, 1993).

Service Areas and Bandwidth Assignments

Background

Our May hearing revealed several differing viewpoints on the way service area and bandwidth assignments might be used to promote small business participation. The Small Business PCS Association (SBPA) emphasizes that small businesses will be effectively excluded from all but the smallest service area being considered due to the capital intensive nature of PCS technology, and that even the Basic Trading Area "will be a large bite for small businesses to swallow in large metropolitan areas." SBPA's recommends two regional service areas and two BTA's spectrum blocks for small business eligibles. One of the small business BTA spectrum blocks would be awarded as a "Small Business Developer's License" to a qualifying small business experimental license holder who has put forth significant effort and investment in developing the service being licensed.²³

APC, an advocate of 40 MHz allocations, maintains that small spectrum blocks will delay deployment, cripple local licensees with high infrastructure costs, and deny economies of scale enjoyed by entrenched competitors.²⁴ According to APC, a better way to target programs for small and minority entrepreneurs is to provide an opportunity for PCS licensees to "franchise" portions of licensing areas to other entities. APC, like SBPA, also points out that a spectrum set-aside may also be a reasonable means to promote entry by small service providers. APC notes that several agencies of the federal government, such as the U.S. Forest Service, the Bureau of Land Management, and the Bureau of Indian Affairs, employ set-asides to foster small business participation in government auctions.²⁵

In a similar vein, MCI originally proposed in the PCS rulemaking that the FCC issue three national PCN licenses, by comparative hearings, to qualified consortia subject to ownership requirements to ensure local diversity, or alternatively, two national licenses with 40 MHz of spectrum

23 Letter of Robert H. Kyle, Chairman, Small Business PCS Association, August 7, 1993.

24 Statement of Gary L. Thomas, American Personal Communications, Inc., May 27, 1993.

25 American Personal Communications, Small Business and Minority Participation in the PCS Industry (August 1993).

and two local licenses with 20 MHz of spectrum. According to MCI, small, minority and female entrepreneurs would benefit from the significant opportunities this approach offers to participate in national consortia as local PCS operators.²⁶ We discuss these approaches below.

Discussion

Our basic premise is that the primary business opportunities the Commission should promote with service areas and bandwidth assignments are those that provide direct licensing opportunities for small service providers, and that mechanisms to encourage new entrants must be balanced with the larger objective of encouraging the best practicable service to the public. Based on these considerations, we have decided to support a regulatory structure with four to five service providers with 20-25 MHz of spectrum in small service areas of equal size, with one spectrum block for small business PCS applicants in the lower band.

Service Areas. In our view, a regulatory structure with many providers, and a large number of small service areas, is likely to promote competition, accelerate deployment, encourage diverse services, and promote economic opportunities. Small service areas permit parallel efforts to deploy PCS infrastructure. Small service areas could also have important benefits during the initial implementation of PCS when the market is still being defined. Accordingly, we support the use of local service areas based on Rand McNelly Basic Trading Areas.

In order to ensure that small licensing areas will not be barrier to delivery of wide area services, the Commission should encourage existing standards-setting bodies to adopt a voluntary "Common Air Interface Standard" for handsets and base stations. The Commission could chose the standard by soliciting recommendations from the Telecommunications Industry Association (TIA), the Institute of Electrical and Electronic Engineers (IEEE), and the Advisory Group of Accredited Standards Committee (T1). We propose that each organization submit no more than two standards by April 1 1994. The Commission could then publish and distribute the recommendations to facilitate consensus on standards issues among small businesses interested in participating in auctions.

Bandwidth Assignments. We recognize that debate over large vs. small spectrum blocks

26 Remarks of Steven Zecola, MCI, Inc., May 27, 1993.

involves any valid concerns. For instance, the costs of relocating existing users may be less with large spectrum blocks since licensees could more easily avoid certain frequencies encumbered by microwave users. Larger allocations could also lead to alternative services, such as larger bandwidth data or imaging services, and affordable equipment for consumers. However, since comparable efficiencies could be accomplished through issuance of tax certificates to microwave incumbents, and by allowing aggregation through group license bids, we are not persuaded that PCS technically requires 40 MHz of spectrum. Instead, we believe that the competition that would result from four or five licenses in each market will better serve the public interest, and foster maximum economic opportunities. For these reasons, we conclude that 20-25 MHz is a reasonable allocation of spectrum for PCS. To ensure that small businesses are not excluded from licensing opportunities due to the use of competitive bidding, we also support at least one 20-25 MHz allocation for small business PCS applicants in the lower band. In any event, the amount of spectrum for the small business allocation should be consistent with the predominant spectrum block allocations.

Conclusion

As indicated before, our vision of PCS leads us to endorse direct mechanisms for promoting economic opportunities rather than rely on indirect "trickle-down" approaches. Nevertheless, we are aware that small service areas and spectrum blocks will provide only a limited number of opportunities for small service providers. Because fixed and operating capital requirements will deter many small companies from participating in PCS as licensees, strategic alliances with larger entities may well be a practical economic necessity for many small companies. For these reasons, we construe the principle of economic opportunity broadly to encompass diverse forms of commercial participation, such as procurement of goods and services and strategic alliances. We examine ancillary opportunities below in the context of regulatory proposals addressing bidding preferences and other procedures.

Bidding Methodology

Bidder Eligibility Conditions

Background. We strongly endorse the principle of encouraging the widest possible participation by private enterprise in PCS development. Some have suggested that the Commission should condition eligibility to bid on minimum procurement efforts as a means to further minority and small business enterprise. For instance, the National Association of Black Owned Broadcasters points

out that "the Commission must create a system of minority incentives similar to those used by other agencies and departments of the Federal government."²⁷ APC likewise notes that several agencies of the federal government, such as the SBA and the Department of Defense, employ incentive policies to provide small business participation in auctions of government property rights.²⁸ We note, however, that the Commission has not requested comment on either of these approaches. In our view, if the regulatory structure for PCS fails to include these types of participatory safeguards, it will fail to achieve the widest possible participation by private enterprise.

General Bidder Eligibility Requirements. We agree that the interest in the widest possible participation could be furthered by requiring a "trustee" commitment from PCS bidders. As a basic condition of eligibility, we believe all bidders should be required to establish and maintain programs designed to ensure that minorities and women are not excluded from licensee efforts to procure equipment and value added services, and to recruit, hire and promote employees. Regulations dealing with employment and procurement practices of PCS regulatees, such as those currently applicable to cable television system operators, can be justified as necessary to enable the FCC to satisfy its obligation under the Omnibus Budget Reconciliation Act to ensure that the regulatory structure for emerging technologies fosters economic opportunity, competition, and new and expanded telecommunications services.²⁹ As Congress, and the Commission acknowledged in the cable context, employment and procurement opportunities are significant areas of economic opportunity which enhance the prospects for telecommunications ownership by minorities and women. In the long run, employment and procurement opportunities should also reduce capital formation difficulties businesses owned by minorities and women face due to lack of technical and managerial experience in the telecommunications field.

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- 27 Letter of James L. Winston, Esq., Executive Director and General Counsel, National Association of Black Owned Broadcasters, May 27, 1993, p. 2.
- 28 We believe targeted policies encouraging employment and procurement opportunities for minorities and women are consistent with range of economic opportunities made possible by programs of other federal agencies. The SBA's section 8(a) procurement program identifies government contracts that should be awarded only to small disadvantaged firms. 13 CFR §124.307 *et seq.* The Department of Defense uses targeted policies to reach its statutory goal of awarding five percent of its contracting and subcontracting dollars to small disadvantaged firms. See generally, DFAR 219.5.
- 29 Compare, NAACP v. FPC, 425 U.S. 662 (1976). See also, Non-discrimination in Common Carrier Employment Practices, 24 FCC 2d 725 (1970).

Cellular and LEC Bidding Requirements. In the interest of economic opportunity, we also support entry provisions for rural cellular licensees and LECs. However, we do have strong reservations about the merits of allowing unconditional eligibility for large cellular licensees and LECs in view of the potential for anti-competitive warehousing of spectrum. The need for restrictions on cellular eligibility presents an opportunity to encourage small business participation. While we are somewhat skeptical about the franchisee relationship as a primary means to promote viable opportunities for new entrants, we view bona fide local consortia, and joint venture arrangements, as a reasonable quid pro quo for eligibility for large cellular and LEC entities -- if they provide new entrants with an equity ownership stake in the licensee entity. We believe this proposal is justified by the fact that the overhead and competitive position of these firms are substantially enhanced by pre-existing infrastructure. Unless eligibility to pursue local licensing opportunities is conditioned on a requirement to form strategic alliances with new entrants, the viability of licensing opportunities for small applicants may be reduced.

Financial Certification Guidelines

In order to realize the full potential of competitive bidding to streamline the licensing process, we believe it is appropriate to permit applicants to self-certify financial qualifications, as outlined below. First, the Commission should affirm that a small applicant may support all, or a substantial part, of the required financial showings with a proposal for an initial public offering, as in Advanced Mobile Phone Service, Inc., 91 FCC 2d 512, 517 (1982). There, the Commission held that an investment banker's letter, combined with the applicant's internal funds and bank commitments, constituted a reasonable assurance.³⁰ In addition, the Commission noted that the rules contemplate that "applicant might need equity financing," and while this was a case of first impression, the IPO proposal deserved "careful analysis" because "we never before licensed such costly facilities..." Id. We believe the need of PCS applicants, especially minority owned applicants, for equity financing to cover the unprecedented cost of acquiring construction permits and building PCS facilities likewise

30 The Commission cited three factors to justify its holding: (1) a large and experienced investment banker was familiar with the marketplace's reaction to the applicant's offerings based on three previous successful financings; (2) the banker had analyzed the applicant's ability to develop additional, sophisticated mobile communications services; and (3) a group of qualified lending institutions had established credit for the applicant aggregating approximately two thirds of the funding required for construction of the proposed cellular facilities.

justifies combined use of "highly confident" letters, letter of intent and commitment letters to satisfy applicable financial qualifications.

Second, the Commission should adopt financial qualifications guidelines that treat SBA chartered Small Business Investment Companies (SBICs) and Specialized Small Business Investment Companies (SSBICs), as bona fide financial institution for reasonable assurance purposes.³¹ The source of an SSBICs capability to act as a de facto financial institutions for small entities stems from their ability to leverage \$3 - 4 from the SBA for every \$1 of equity capital from private sources pursuant to the Small Business Investment Act of 1958.³² As such, SBICs are an integral part of the national policy encouraging development of small business, frequently come under the FCC's ancillary jurisdiction by virtue of the assistance they render to FCC regulatees. In this regard, we note that "Administrative agencies have been required to consider other federal policies ... when fulfilling their mandate to assure that their regulatees operate in the public interest... [A]gencies should constantly be alert to determine whether their policies conflict with other federal policies and whether such conflict can be minimized... [E]stablishment of policies that would accommodate ... diverse interests ... is [also] in keeping with the overall agency responsibility."³³ Treating SBICs as financial institutions is consistent with both the Commission's overall responsibility, and its stated policy for purposes of cellular financial commitments, that "we do not wish to exclude smaller entities with the financial ability and genuine desire to finance cellular systems."³⁴ As indicated in the section below on tax certificates, we believe tax certificates would also enhance the financial ability of SBICs to assist FCC regulatees.

Innovator Bidding Credits

Background. Of course, the central concern over the use of competitive bidding lies in

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- 31 Compare, Application for Review of Salt City Communications, Inc. in MM Docket 89-311 (August 6, 1993) (File No. BPH-870918MN).
- 32 Storer Broadcasting Company, 70 FCC 2d 709 (1979). SBICs are allowed to leverage \$3 from the SBA per \$1 of private capital, while SSBICs can leverage \$4 per \$1 of private capital.
- 33 LaRose v. FCC, 494 F. 2d 1145 (D.C. Circuit 1974).
- 34 Rules for Rural Cellular Service, 4 FCC Rcd 2542 (1988). See also, Washington's Christian Television Outreach, Inc., BC 002820, released August 19, 1981 (Hearing Designation Order).

potential adverse effects on opportunities for new entrants.³⁵ To avert spectrum inefficiency and exclusion of innovative and efficient service providers, the Act gives the Commission broad discretion to establish flexible payment methods. Specifically, the Act requires the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the [economic opportunity] objectives..." There are several ways the Commission can use this discretion to respond to requests for policies to promote superior service efforts to the public and "economic opportunity".

While the details of the various proposals differ, a common theme among them is the demand for appropriate recognition of innovative proposals for equitable distribution of service to the public, and spectrum-efficient infrastructure sharing arrangements that encourage new entry. For example, American Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. advocate a "host license" arrangement for firms offering specialized PCS services. APC states that by adopting a program that would establish and guarantee "technology affiliations" with a PCS licensee to secure a portion of the licensee's overall licensed areas, small business could share a portion of the licensee's facilities, particularly in switching and access management functions, and other services, such as billing, marketing, maintenance, technical matters, and accounting. CalCell Wireless advocates an "infrastructure preference" for PCS applicants that commit to serve and operate in designated enterprise zones and promote participation by racial minorities. MCI advocates a consortium approach with opportunities for small, minority and female entrepreneurs. NABOB contends that major companies deriving substantial benefits from FCC licenses should be required to joint venture or otherwise participate with minority companies. SBPA recommends a Small Business Developer's License for experimental licensees who have put forth significant effort and investment in developing the service being licensed. Tampa Electric Company calls for partnering incentives between 2 GHz incumbents and PCS licensees based on the wholesale licensee concept.

Discussion. These proposals indicate that the Commission could protect the public interest in the use of spectrum by authorizing alternative methods of bidding, bid calculation, and bid

35 Letter of Hon. Larry Irving, Assistant Secretary for Communications and Information, to David Honig, trustee, Minority Media Ownership Fund, June 17, 1993.

payments for bidders with superior service proposals. In particular, alternative bidding calculations would allow technical and non-technical innovators to discount a percentage of the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, bidder would have to qualify as (a) a member of a designated group, or (b) as a consortia owned and controlled by firms owned by members of the designated groups. The business development proposal could establish eligibility for credits based on multiples of expenditures for research and development on spectrum efficiency incurred by the applicant; the projected value of the bidder's commercial activities to the community of license; or the value of public services the bidder proposes to offer. Public service could include, for example, provision of on-the-job training or work-study relationships with local educational institutions. We believe a ten percent credit for individual small business entities is an adequate incentive for this purpose. For business development proposals involving consortia, the consortia should be allowed to elect a combination of credits and installment payments reflecting the quantifiable value of the proposal involved, not to exceed twenty five percent of the total bid.

Installment Payments and Royalties

Where small entities bid, but make no superior service proposal, the Commission can foster economic opportunities by allowing unconditional installment payments with or without royalties. Consistent with the purpose of the Budget Reconciliation Act, this approach would permit winning small bidders to elect to make payments over time, and thereby reduce the up-front capital requirements the prospective licensee must have to bid. However, we are somewhat uncertain about the net value of royalty payments to small businesses. MCI points out that the recovery of \$4 billion in the form of auction bids from PCS licenses over the next five years would equate to an effective charge of \$12 per PCS customer per month. This is roughly 25 percent of expected revenues, assuming 1.6 million PCS customers in 1994, and 9 million in 1998. The burden of this surcharge for spectrum access, it is asserted, would "eliminate the ability of new PCS entrants to compete against the entrenched [cellular incumbents]."³⁶ For these reasons, we do not view royalties as the optimal solution to the entry cost problems of small business bidders.

Distress Sales

36 Steve Zecola, MCI, *supra*, note 26.

The broadcast distress sale policy has some promise as a model for an economic opportunity safeguard. In the broadcast context, licensees designated for hearing have the option to assign the license to a minority firm for 75% of market value or less. Distress sales serve the dual public interests in diversity of ownership and administrative efficiency by obviating the need for costly and time-consuming hearings to resolve alleged violations of Commission rules, while remedying informational and financial barriers to market entry for historically underrepresented groups. In the PCS context, a distress sale policy could achieve analogous administrative equities and efficiencies.

In order to assure prompt delivery of PCS services to the American public, the Narrowband PCS Order provides that failure by any licensee to meet construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it. At the present time, however, no provisions for the disposition of the narrowband or broadband PCS licenses exist. The distress sale concept could answer this problem by granting forbearance on royalties or installment payments if the defaulting licensee assigns the license to a new qualified small business entrant. Unlike the broadcast distress payment, however, the assignee of a PCS distress sale license would assume all or part of the licensee's obligation.

Another variation of the distress sale concept might apply where tentative winners are ineligible, unqualified, or unable to pay, such as in the context of multiple license bids. We believe the Commission should impose penalties on parties that knowingly abuse the bidding process. This policy could also include a distress sale option to create incentives for defaulting bidding to assign construction permits to small entities.

Communications Capital Fund

Spectrum auctions would benefit designated groups to a greater extent if a portion of the revenues from spectrum auctions were reinvested in small businesses seeking to enter the communications field.³⁷ Accordingly, we recommend that the Commission seek legislation from Congress to establish an investment fund for small businesses. Alternatively, the Commission could explore with the NTIA and the SBA whether an executive order can and should be adopted to

37 Prof. Andrea Johnson, Statement before the SBAC, May 27, 1993, p 6.

accomplish this end.

Tax Certificates

Background

The SBAC has reviewed numerous expressions of interest in routine issuance of §1071 tax certificates for various PCS transactions. The SBA Office of Advocacy, through a spokesman who participated in our May hearings, informally endorsed consideration of the use of tax certificates for investments in SBA licensed investment companies. Several parties also advocated various proposals for issuance of tax certificates to entrepreneurs in PCS industries.³⁸ Numerous parties in the Emerging Technologies proceeding submitted comments in support of the Commission's subsequent determination that Docket 90-314 is eligible for §1071 treatment, and that issuance of tax certificates is necessary to facilitate relocation of microwave licensees in the 2 GHz frequency band.

Discussion

At the outset, we are compelled to acknowledge certain criticisms involving allegations of misrepresentation and rapid transfer of facilities acquired with tax certificates. For example, the 1958 amendments to the tax certificate statute resulted from some cases in which broadcast properties were intentionally acquired in excess of the applicable multiple ownership rules, and then improperly sold in an attempt to obtain certificates that would not otherwise be available. While we are not aware of any recent deliberate abuses along these lines, we believe IRS authority to rescind tax certificate benefits upon a finding by the Commission that a sale or exchange under the policy involved fraud or misrepresentation operates as a strong structural deterrent to abuse.³⁹ We are also aware that the one year holding period requirement applicable to minority owned facilities acquired under §1071 has been criticized. The one year rule, however, was adopted in a Commission action repealing anti-trafficking rules and was not originally a part of the tax certificate policy.⁴⁰ The solution to this problem, therefore, would appear to be the reinstatement of a lengthier holding period for all broadcast licensees.

38 The parties include representatives from a coalition of civil rights groups, the Coalition to Improve the Tax Certificate Policies, and American Personal Communications, Inc.

39 Cloutier v. United States, 709 F.2d 480 (7th Cir. 1983).

40 Prior to that time, minority owners, like other licensees, were routinely required to hold the license for a minimum period of three years Amendment of Section 73.3597 of the Commission's Rules, 99 F.C.C. 2d 971,973, 974 (1985).

While we are concerned by these criticisms, we believe the benefits of the policy far outweigh the disadvantages. First of all, §1071 authorizes capital gains deferrals, rather than capital gains exemptions, tax credits, or across-the-board tax rate reductions. In this regard, the benefit of the tax certificate is more comparable to an interest-free government loan equal to the taxable portion of the gain. Moreover, as with involuntary conversions of property covered by §1033 of the Internal Revenue Code, the policy also leverages private investment by requiring entrepreneurs to use the entire gain from the sale to reinvest or reduce basis in retained property. This means that for every dollar in taxes the taxpayer avoids, the tax certificate leverages about three dollars of private reinvestment capital, for public interest investment, that were not subject to taxation in the first instance. We note that the government also captures tax revenues from the jobs associated with the buyer's grandfathered property, from jobs associated with the seller's replacement property, and from the sale of the depreciated or replacement property if the sale produces a taxable gain.

Conclusion and Summary of Recommendations

Due to the important capital leveraging benefits, and apparent fiscal neutrality of the policy, we support extending tax certificate treatment to microwave licensees and SBA chartered investment companies that promote small business participation in PCS deployment. We also urge the Commission to revise the existing minority tax certificate program. At the same time, it has come to our attention that the U.S. House Subcommittee on Select Revenue Measures will hold hearings on proposals to deter abuse of the tax certificate policies. We support these efforts to deter abuse of the public trust and intend to work closely with the Commission and the Congress to ensure, to the extent possible, that no abuses result if the proposals we endorse below are adopted.

Microwave Tax Certificates. The basic justification for issuing tax certificates to microwave licensees is that deployment of broadband PCS technology cannot commence until the 2 GHz frequency band allocated for PCS is vacated. The rules give most incumbents three years to relocate voluntarily with the assistance of tax certificates, however, some incumbents are exempt from these rules. We believe these rules should have two economic opportunity components. First, we propose that the Commission consult with the IRS on ways to encourage incumbents seeking tax certificate treatment for relocation to satisfy replacement property requirements by investing in small business

concerns. Second, we propose that the Commission issue tax certificates to exempt microwave licensees that establish PCS consortia or joint ventures, and extend equity ownership opportunities to small business concerns, upon divestiture of their interest in the consortia or venture. Giving exempt incumbents the option to participate in the development and implementation of PCS facilities, by forming small business consortia, could accelerate speed of deployment while meeting financial and technical assistance needs of small business concerns.

SSBIC Tax Certificates. We also agree with the SBA Office of Advocacy that the Commission should consider extending tax certificates to encourage investment by, and in, SBA chartered SSBICs that provide debt and equity financing, and technical assistance, to licensees and applicants owned by members of minority groups and women. Integration of the Commission's tax certificate program with the SBA's SSBIC program is appropriate for several reasons. Tax certificates would make SSBICs specializing in telecommunications more competitive with venture capital firms in other fields as a result of tax advantaged capital gains deferrals. This would also enhance their ability to syndicate debt and equity securities for small business participation in PCS development and implementation. As we pointed out before, passive investors, including SSBICs, have long been subject to the FCC's regulatory jurisdiction by virtue of assistance provided to FCC licensees.⁴¹ Finally, cooperation between the FCC, SBA and IRS would also help contain the potential for abuse.

Minority Tax Certificates. Finally, the use of tax certificates to promote minority ownership of non-broadcast facilities has been advocated for over a decade.⁴² At the recommendation of the 1982 FCC Advisory Committee on Alternative Financing Strategies for Minority Telecommunications Ventures, members of Congress introduced proposals for extension of §1071 to non-broadcast transactions in 1983. In 1990, the League of United Latin American Citizens, the National Association

41 While the resources available to SSBICs are modest compared to chartered banks and savings and loan institutions, the Commission has stated for purposes of cellular financial commitments that "we do not wish to exclude smaller entities with the financial ability and genuine desire to finance cellular systems." Rules for Rural Cellular Service, 4 FCC Rcd 2542 (1988) See also, Washington's Chngpen Television Outreach, Inc., 8C 002820, released August 19, 1981 (Hearing Designation Order).

42 For a discussion on the use of minority tax certificates in the broadcast area, see Krasnow, Kennard, and Temkin, Maximizing the Benefits of Tax Certificates in Broadcast and Cable Ventures, Hastings Communications and Entertainment Law Journal, Volume 13, Number 4 (Summer 1991).

for the Advancement of Colored People, the National Black Media Coalition, and the National Hispanic Media Coalition, petitioned for issuance of tax certificates for satellite transponder enterprises. In 1992, the Coalition to Improve the Tax Certificate Policies petitioned the Commission to expand the tax certificate policy to promote investment by joint ventures and specialized minority venture capital funds in common carrier and non-mass media technologies. The recent passage of the Budget Reconciliation Act eclipses the various legal ambiguities and technicalities that have encumbered consideration of these proposals. For reasons we have already substantially explained throughout this report, we believe the time has come to take action. Therefore, we urge the Commission to respond favorably by announcing that in the future it will follow the expansive definition of "broadcasting" applied in Telocator Network of America, 58 RR 2d 1443 (1985), recon dismissed, 1 FCC Rcd. 509 (1986) in reviewing requests for PCS tax certificates pursuant to the Statement of Policy Regarding Minority Ownership In Broadcasting, 52 R.R. 2d 1301 (1982).

CLASSIFICATION STANDARDS

Background

The SBA administers a variable standard for determining whether an entity is small for purposes of obtaining financial assistance from an SBIC. The standard permits an applicant to qualify based on a net worth not in excess of \$6.0 million with average net income after Federal income taxes for the two preceding years not in excess of \$2.0 million. Alternatively, the applicant can qualify by showing that together with affiliates, and excluding affiliates, it meets the size standard for the industry in which it is primarily engaged as set forth in §121.601. See, 13 CFR 121.802(a)(1)(2). Regarding the latter test, PCS fits the definition of a radiotelephone service which the Census Bureau includes in standard industrial classification code 4812. SBA standards define "small" in that SIC code as firms that employ 1,500 employees or less. 13 CFR 121.610. In addition, SBA guidelines contain provisions for waiver whereby applicable thresholds are increased by 25% whenever an applicant agrees to use the SBA's assistance within a "labor surplus area" or "redevelopment area." §121.802(d).

Discussion

The basic problem with the existing standards is that these standards were not tailored to implement the economic opportunity provisions of the Budget Reconciliation Act. The existing net

worth/income size standard is probably too low for an industry that will be as capital intensive as the PCS industry. The service area and bandwidth recommendations would not be effective if the classification excludes independently owned and non-dominant firms with the wherewithal to construct PCS facilities that may cost from \$50 - 100 million. On the other hand, size standards based on a threshold of 1,500 employees is too high. This threshold runs the risk that the vast majority of the entities covered by SIC Code 4812 would be eligible for bidding preferences and tax certificate assistance even though these entities face no special history of exclusion or economic disadvantage.

If the Commission concurs that a new standard should be established, it will also have to determine whether the Small Business Act governs its discretion to prescribe numerical size standards for determining whether an entity is small. Prior to the Small Business Credit and Business Opportunity Enhancement Act of 1992, federal agencies could establish size standards for activities not covered by the Small Business Act by merely consulting with the SBA Administrator. The 1992 amendments limit agency discretion by requiring agencies to promulgate size standards based on gross receipts indices that are to be approved by the SBA Administrator and to comply with SBA policies regarding the formulation of the standards.⁴³ The Act, however, does not "impair the ability of an agency to implement small business size standards without obtaining SBA's concurrence in response to a specific statutory direction or a general legislative authorization to prescribe small business size standards." Thus, if the Commission determines that the Budget Reconciliation Act constitutes a specific statutory direction, consultation with the SBA Administrator should suffice for procedural purposes.

Conclusion

Consistent with our focus on capital formation and utilization of SBICs, we believe size standards should be consistent with the SBA's approach to eligibility for financial assistance from SBICs; however, we also believe different thresholds need to be established. We believe the

43 Under the SBA's proposed regulations to implement the Act, an agency may prescribe a size standard different from that determined by the SBA under three conditions. First, the standard is being proposed after an opportunity for notice and comment. Second, the standards provide for size determinations of concerns providing services based on average gross receipts over a period not less than three years. Third, the size standard must be approved by the SBA Administrator.

appropriate method of resolving this issue is to request comment on this point in future proceedings in this Docket. As a starting point for discussion, the Commission should seek comment on whether to set the threshold at \$20 million, with waivers of up to 25% for entities that use federal assistance in labor surplus areas. The Commission should solicit the SBA's assistance and cooperation so that to ensure that a proper standard is set regardless of which procedure prevails. Regarding control criteria, we believe minority and female controlled entities should be subject to anti-trafficking requirements, should maintain 51% equity and voting control from the initial grant through construction and operation of the PCS license.

SUMMARY AND CONCLUSION

We believe the proposals we endorse in this report are responsible efforts to promote economic opportunity and fair to all concerned. Both the public, especially small businesses and residential consumers, will benefit from the enhanced spectrum efficiencies and innovations that will likely result from spectrum set-asides for small businesses, and incentives for strategic spectrum sharing alliances with small businesses. In addition, we have tailored our recommendations on bidding preferences, tax certificates, and certification of financial qualifications, to address serious capital formation difficulties which have the potential to distort PCS development and implementation. If adopted, we believe these proposals would, in a moderate way, mitigate the persistent barriers that African Americans, Hispanic Americans, Native Americans, and Asian Americans, have encountered in their long quest for parity of ownership in telecommunications, while also empowering women to extend the tremendous strides they have made in other fields of the economy to the field of telecommunications. We also believe that the measures we propose will benefit small rural telephone companies by guaranteeing these entities the opportunity to compete for licenses in their local areas, and by supplementing financial and technical assistance available the financial assistance of the Rural Electrification Administration.



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