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October 3, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: PP Docket No. 93-253
GEN Docket No. 90-314, ET Docket No. 92-100

Dear Mr. Canton:

Enclosed herein, on behalf of Essence Communications, Inc., are an original and nine copies of its Reply Comments in response to the Commission's Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking pursuant to Sections 1.415 and 1.419 of the Commission's rules.

In the event there are any questions concerning this matter, please contact me at the number listed above.

Very truly yours,

Thomas A. Hart, Jr.

Thomas A. Hart, Jr.

TAH:pd

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of §309(j) of the Communications Act - Competitive Bidding Narrowband PCS	)	PP Docket No. 93-253
	)	
and	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314 ET Docket No. 92-100

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REPLY COMMENTS OF ESSENCE COMMUNICATIONS, INC.

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October 3, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of §309(j)	)	**PP Docket No. 93-253**
of the Communications Act -	)	
Competitive Bidding	)	
Narrowband PCS	)	
	)	
and	)	
	)	
Amendment of the Commission's	)	**GEN Docket No. 90-314**
Rules to Establish New Personal	)	**ET Docket No. 92-100**
Communications Services	)	
	)	

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To: The Commission

REPLY COMMENTS OF ESSENCE COMMUNICATIONS, INC.

Essence Communications, Inc. ("Essence"), by its counsel, hereby replies to comments filed in response to the Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking ("FNPR"), in PP Docket No. 93-253, FCC 94-219 (released August 17, 1994).[1] In its Reply Comments, Essence urges the Federal Communications Commission ("Commission") to adopt the two following recommendations because they are necessary to ensure that minority-owned businesses have an opportunity to become licensees of Personal Communications Services.

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[1] Essence also attaches hereto a filing in a related docket which addressed issues raised by the FNPR, particularly the establishment of an entrepreneur's block in future auctions.

1. **Reserve for exclusive bidding by entrepreneurs the amount of spectrum proposed by the Commission,** and

2. **Create nationwide licenses within the entrepreneurs blocks by aggregating both BTA licenses which are very limited in value and under-utilized interactive seamless technology.**

3. **Incorporate into all future auctions the bidding enhancements previously promulgated by the Commission.**

Essence also responds those commenters who criticized each recommendation.

Essence is a Credible Designated Entity

Essence's Reply Comments should be strongly considered because Essence has established itself as a credible voice for designated entities, having participated in the National Narrowband PCS Auction in July. Also, Essence is sensitive to the concerns and interests of designated entities because they comprise a substantial portion of its customer base. Essence publishes two monthly magazines: Essence, a magazine for African-American women with a circulation of approximately one million subscribers, and Income Opportunities, a magazine focusing on entrepreneurial opportunities in emerging technologies with over four hundred thousand subscribers. Therefore, subscribers and readers of Essence publications generally fall within all three basic categories of designated entities: (i) African-Americans, (ii) women and (iii) owners of small businesses.

Essence has also produced, and continues to produce, television shows including for the past seven years a two-hour, prime time network awards special profiling prominent entertainers and leaders in the African-American community. Essence is currently in pre-production for a national television special to air July 1995 from New Orleans in celebration of the 25th anniversary of its founding.

Today, Essence is one of the country's leading minority owned enterprises, currently ranking in the top twenty of "Black Enterprise Top 100 Companies". Essence is a privately-owned company with nearly 100 employees staffing offices in New York, Atlanta, Chicago and Los Angeles. Among its shareholders and board of directors are Edward Lewis, Clarence Smith, Camille Cosby, J. Bruce Llewellyn, Frank Savage, Jim Dowdy, Maxine Waters and Nat Lehrman. Many of these individuals have ownership interests and experience in owning and operating television and cable properties.

Essence sought to expand its involvement in telecommunications by bidding in the National Narrowband PCS Auction on July 24, 1994.[2] Essence participated in 23 rounds of the auction, lead the bidding for six rounds, and was the last designated entity to withdraw from the bidding. Ultimately, like all other designated entities participating, Essence did not obtain a license in any of the ten blocks (including the three that offered bidding credits) because non-designated entities substantially outbid them. Notwithstanding this disappointment, Essence plans to participate in the regional narrowband PCS auction on October 26, 1994, as well as in future PCS auctions.

Essence's commitment to obtain a PCS license was demonstrated immediately following the national narrowband auctions when Essence filed Comments and Recommendations on behalf of designated entities that participated in the PCS auction. See Post-Auction Comments and Recommendations of Essence, ex parte filing, in GEN Docket No. 90-314, dated August 12, 1994; Comments and Recommendations of Essence Communications, Inc. in Response to The

---

[2] Essence Television Productions, Inc., a wholly-owned subsidiary of Essence was the applicant of record in the national narrowband PCS auction in July and is registered for the upcoming auction in October.

Commission's Third Memorandum Opinion and Order, ex parte filing, in GEN Docket No. 90-314, dated September 14, 1994. In consideration of all of the above, Essence has become a voice for all designated entities and therefore Essence's Reply Comments should be provided substantial consideration on the issues in this proceeding.

The Commission now seeks reply comments on the necessity of adopting regulations which would encourage investment by minority-owned businesses in future auctions. FNPR at ¶ 64. In this filing, Essence urges the Commission to adopt the recommendations below as necessary to ensure that minority-owned businesses have an opportunity to provide PCS services.

1. Reserve for exclusive bidding by entrepreneurs the amount of spectrum proposed by the Commission.

In the FNPR, the Commission proposed to reserve up to four MTA frequency blocks -- 19, 21, 22 and 24 -- and both BTA frequency blocks -- 25 and 26 -- for exclusive bidding by entrepreneurs.[3] Though Essence favors aggregation of the BTA frequency blocks into national frequency blocks (as discussed in greater detail below), Essence believes that the Commission's proposal to reserve this amount of spectrum for entrepreneurs is necessary to neutralize the unexpected results of the national narrowband PCS auction. In its comments, the United States Small Business Administration ("SBA") strongly supports the Commission's proposal on this issue, see SBA Comments at 3-4 ("Office of Advocacy cannot endorse strongly enough the proposals of the Commission"), as does the Association of Independent Designated Entities ("AIDE"), see AIDE Comments at 3-4 ("AIDE strongly supports [the entrepreneur's block] proposals"). Both the SBA and AIDE cited the results of the national narrowband auction and

[3]To bid in the entrepreneur's blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than $125 million in gross revenues and less than $500 million in total assets. No individual attributable investor or affiliate may have $100 million or more in personal net worth.

the inability of designated entities to obtain a national license therein as support for creating a reservation block for entrepreneurs and increasing spectrum within that block. See AIDE Comments at 3-4; SBA Comments at 3-4. The Commission has relied on these parties in the recent past for support on other issues, see Third Memorandum Opinion and Order at ¶¶ 42-46, 53 (SBA) and ¶ 34 (AIDE), and should do so here.

The Personal Communication Industry Association ("PCIA") argued against the establishment of an entrepreneur's block. PCIA argues that national licenses were never a viable or realistic opportunity for designated entities because of the cost of licenses and build-out. PCIA correctly cites that the lowest fee paid for a national license was $37 million and that build-out costs could be even greater. PCIA, however, incorrectly concludes that the national narrowband auction is therefore not an appropriate benchmark for measuring the efficacy of the Commission's bidding policies for designated entities. As an alternative, PCIA suggests that MTA licenses are feasible for designated entities, especially in light of the now-available installment payments.

By claiming that a national license was unrealistic for designated entities, PCIA misses the point entirely: the Commission largely controls the destiny of designated entities and their entry into the PCS industry. The Commission controls the entire licensing process, determines the extent to which bidding enhancements will be established, can provide many financing alternative and, therefore, ultimately impact the prices paid for licenses. The Commission can make a national license realistic ally attainable for designated entities. For example, the Commission could have provided a range of bidding enhancements for the national auction had the Commission known beforehand that they were necessary. Therefore, the results of the

national auction should not be used against designated entities in their efforts to level the playing field. In fact, PCIA's recounting of the high costs of purchasing a national license tends to prove Essence's point, more than its own. The high cost of a license shows that more, not less, should be done by the Commission to create opportunities for designated entities. The national narrowband auction was not just a learning experience for use in future auctions but, for designated entities, a lost opportunity which itself must be corrected. The situation is not futile, as PCIA would have the Commission believe, because the Commission has control and can effect proper change.

In their comments, the SBA and AIDE also fully support the inclusion of Channels 19, 21, 22, 24, 25 and 26 within the entrepreneur's block. AirTouch suggests that, even if entrepreneur's blocks are established, only Channels 25 and 26 should be included. AirTouch complains that an entrepreneur's block with six channels is not required by Congress and raises costs for non-entrepreneurs. Further, AirTouch asserts that the alternative of reserving two channels is sufficient for significant and meaningful participation in PCS.

First, AirTouch's claim that there is no congressional requirement is misleading. There is a Congressional mandate: to "promot[e] economic opportunity and competition," to "avoid[] excessive concentration of licenses" and to "disseminat[e] licenses among a wide variety of applicants," including small businesses and businesses owned by members of minority groups. 47 U.S.C. § 309(j)(3)(B). Congress has required the Commission to "ensure" that small businesses and businesses owned by members of minority groups are given an opportunity to participate in the provision of spectrum-based services. 47 U.S.C. § 309(j)(4)(D). Even though Congress was not explicit in specifying entrepreneur's blocks (Congress encouraged the

Commission to experiment with a variety of techniques to ensure that small businesses and those owned by minorities have an opportunity to participate in spectrum-based services), Congress was absolutely clear in its desired result. The best way to "ensure" designated entity participation in providing PCS is to establish an entrepreneur's block. Now that the national narrowband auction proved that bidding credits will not alone be effective, entrepreneur's blocks are necessary.

Second, the impact on non-designated entities is minimized by the fact that non-designated entities have already benefitted at the national narrowband auction from the lack of a level playing field. For example, if licenses were still issued by comparative hearings or lotteries, a designated entity would very likely have obtained a national license -- essentially free -- based on the principle of ownership diversity. Now, given the mandate from Congress to implement competitive bidding, non-designated entities with enormous capital and access to financial resources benefitted tremendously. Therefore, as the Commission also implements its mandate to widely disseminate licenses, any impact felt by non-designated entities merely neutralizes the effects of the national auction.

Finally, as discussed in greater detail below, establishing only the BTA channels in the entrepreneur's block is totally unsatisfactory. The two BTA channels are of very limited value and under-utilize the interactive, seamless nationwide technology. Thus, an entrepreneur's block of those two channels in only BTA areas would be ineffectual in advancing minority owned businesses in the telecommunications industry.

2. **Create nationwide licenses within the entrepreneurs blocks by aggregating both BTA licenses which are very limited in value and under-utilized interactive seamless technology.**

In the FNPR, the Commission proposed to redesignate both BTA licenses as regional licenses and also sought comment on other means to achieve larger geographic license sizes such as designating the BTA licenses as nationwide licenses. Essence fully supports the Commission's concept of redesignating the BTA licenses as nationwide licenses. AIDE comments that it is in full support of redesignating licenses to make up for the existing imbalance in narrowband PCS licensing.

"PCIA, on the other hand, suggests that the creation of national licenses would be unfair and illegal, given the reliance of the July 1994 auction winners. Mobile Telecommunication Technology Corp. ("Mtel") claims that adding to the spectrum allocated to nationwide narrowband PCS would be "fundamentally unfair" and lead to discounting of future bids to account for this risk. However, the Commission has stated prior to the national auction that it "will continue to assess the effectiveness of the measures taken in this proceeding, and **will apply any knowledge gained to subsequent auctions**." Third Memorandum Opinion and Order at ¶ 40 (citing Third Report and Order, in PP Docket No. 93-253, FCC 94-98 (released May 10, 1994), at ¶ 70)(emphasis added). This proviso was necessary because of the experimental nature of the competitive bidding process. Therefore, the argument against change ignores one of the basic conditions, known and accepted by all bidders prior to the national auction, that designated entity provisions may change. Presumably, bidders have already discounted for the regulatory risk associated with this condition."

PCIA also suggests that redesignation would create fewer opportunities for designated entities. Presumably, PCIA means that by aggregating channels the Commission would be lowering the number of licenses available to designated entities, and thus lowering the overall number of designated entities with licenses in the industry.

Even though the number of licenses would diminish, the quality of opportunities represented by those licenses would be far superior. A BTA licensee will have difficulty competing against the national, regional and MTA licensees in its own geographic area. Licensees covering a larger area can provide better services in terms of user-mobility and also can take advantage of economies of scale. Further, unlike non-regulated businesses which can grow incrementally without limit, PCS providers with BTA licenses can experience incremental growth only within its geographic area. The geographic limit can only be overcome by purchasing new licenses in the open market, a barrier which puts designated entities back at the starting point as far as this proceeding is concerned. It is well-known that, designated entities experience "extraordinary" difficulties in the private lending market, FNPR at ¶ 66 (citing Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366), and thus would have difficulty expanding their operations by buying other existing paging systems.

Further, the scope of the overall service area is a crucial factor in obtaining buildout and operational financing. By limiting the geographic scope of service to BTAs, the Commission also would limit minority-owned businesses -- severely limited as they are in obtaining financing and capital -- in overcoming the extraordinary barriers they face. Therefore, in order to empower the minority telecommunication industry at a strong level, it is essential that designated

entities be provided a foothold into the seamless nationwide coverage offered by a national license.

3. Incorporate into all future auctions the bidding enhancements previously promulgated by the Commission.

Since the national narrowband auction, the Commission has reviewed the rules and applied its experience to designing the procedures for the regional auction. The results of the national narrowband auction compelled these positive changes. The dual objective has been to level the playing field for designated entities. The Commission developed the following new rules:

* A 40% bidding credit was established for designated entities in the regional narrowband auction;

* An installment financing plan was adopted for minority-owned businesses in the regional narrowband auction;

* Ownership changes were authorized even if made after the Short Form Application (FCC Form 175) is filed (provided such changes do not result in change of control).

* Permitting minority-owned companies to acquire financing from public markets and still retain the incentives and benefits as a designated entity.

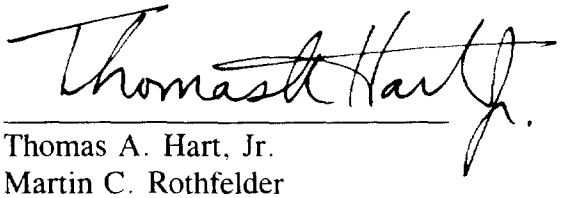
In order to continue promoting both objectives, it is important that the Commission build on these developments in future auctions, rather than substitute others in their place or retreat into previous practices. Therefore, the Commission should incorporate into all future auctions the bidding enhancements previously promulgated by the Commission as set forth above and expand these enhancements to include the reservation of spectrum blocks for entrepreneurs.

CONCLUSION

Essence, as a voice for all designated entities, urges the Commission implement the following recommendations to ensure that minority-owned businesses have an opportunity to provide PCS services. The Commission should reserve for exclusive bidding by entrepreneurs the amount of spectrum proposed by the Commission to neutralize the unexpected results of the national auction, and create nationwide licenses within the entrepreneur's blocks by aggregating both BTA licenses which are very limited in value and under-utilized interactive seamless technology.

For the reasons stated above, the recommendations included herein should be adopted in full by the Commission prior to the next PCS Auction.

Respectfully submitted,



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Counsel for Essence Communications, Inc.

CERTIFICATE OF SERVICE

I, Patrice Dowtin, a secretary in the offices of McManimon & Scotland, hereby certify that on this 3rd day of October, 1994, I have caused copies of the foregoing Reply Comments of Essence Communications, Inc. to be delivered by hand, courier charges prepaid, or by first-class mail, postage prepaid, to the following:

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

	)	GEN Docket No. 90-314
	)	ET Docket No. 92-100
In the Matter of	)	
	)	RM-7140, RM-7175, RM-7617
Amendment of the Commission's	)	RM-7618, RM-7760, RM-7782
Rules to Establish New Personal	)	RM-7860, RM-7977, RM-7978,
Communications Services	)	RM-7979, RM-7980
	)	
	)	PP-35 through PP-40, PP-79
	)	through PP-85

COMMENTS AND RECOMMENDATIONS OF ESSENCE COMMUNICATIONS, INC. IN RESPONSE TO THE COMMISSION'S THIRD MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

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Thomas A. Hart, Jr.
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Daniel N. Max

September 14, 1994

INTRODUCTION

Essence Communications, Inc. ("Essence"), through counsel, hereby files a response to the Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in the above proceeding. Essence, a designated entity, was a participant in the Federal Communication Commission's (Commission) auction for national narrowband Personal Communications Services (PCS) licenses. Essence Television Productions, Inc., a wholly-owned subsidiary of Essence Communications, Inc., was the actual applicant of record in the national narrowband PCS auction. Essence also plans to participate in the Regional Narrowband Auction on October 26, 1994, as well as in future Broadband PCS auctions.

ESSENCE

Founded nearly 25 years ago, Essence is one of the country's leading minority-owned enterprises, currently ranking in the top 20 of "Black Enterprise Top 100 Companies". Essence publishes a monthly magazine, Essence, with a circulation of approximately one million subscribers. Essence publishes another monthly magazine entitled Income Opportunities, which has over four hundred thousand readers and focuses on entrepreneurial opportunities in emerging technology. From 1984 to 1988, Essence produced a nationally syndicated, weekly television show hosted by Susan Taylor, and for the past seven years has hosted and produced a two hour prime-time network televised awards special profiling prominent entertainers and leaders in the African-American community. Essence is currently in pre-production for a national television special to air July 1995 in celebration of the 25th anniversary of its founding. Essence, a

privately-owned company, has nearly 100 employees and has offices in New York, Atlanta, Chicago and Los Angeles.

Among its shareholders and board of directors are: Ed Lewis, Clarence Smith, Camille Cosby, J. Bruce Llewellyn, Frank Savage, Jim Dowdy, Maxine Waters and Nat Lehrman. Many of these individuals have ownership interests and experience in owning and operating television and cable properties. (See attached ownership information on Essence.)

BACKGROUND

I. Recent experience demonstrates that the Commission must do more to promote minority ownership of PCS.

Essence sought to expand its involvement in telecommunications by bidding in the national narrowband PCS auction on July 24, 1994. Essence participated in 23 rounds of the auction, lead the bidding for six rounds, and was the last designated entity to withdraw from the bidding. Ultimately, like all other designated entities participating, Essence did not obtain a license in any of the ten blocks (including the three that offered bidding credits), because non-designated entities substantially outbid them.

As a result, the Commission, in its Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking,[1] recognized that it was necessary to do more to ensure that designated entities have a meaningful opportunity to successfully compete in the narrowband PCS auctions and the development of the overall industry. In the Order, the Commission acknowledged its faulty assumption that narrowband PCS would involve relatively low capital

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[1] Third Memorandum Opinion and Order and Further Notice of Rulemaking in PP Docket No. 93-253, FCC 94-219, 9 FCC Rcd. _____, released August 17, 1994.

entry requirements,[2] and reiterated its commitment to "continue to assess the effectiveness of measures adopted for narrowband PCS", and to "apply any knowledge gained to subsequent auctions."[3]

Congress recently authorized the Federal Communications Commission to employ competitive bidding procedures in issuing initial licenses for the use of the electromagnetic spectrum.[4] Specifically, Congress added a new section, 47 U.S.C. § 309(j)(1), under which "the Commission shall have the authority . . . to grant [licenses] through the use of a system of competitive bidding. . ." if the bidding system meets certain conditions. With this Act, Congress altered its fifty-year tradition of requiring the Commission to conduct comparative hearings and lotteries in allocating new licenses.

This summer, the nation watched as ten country-wide licenses went up for bid at the first auction and all ten reaped prices more than ten-fold what the federal government had expected.[5] Some of the nation's largest telecommunications companies were winners at the auction: Paging Network, Inc. (three licenses), McCaw Cellular Communications, Inc. (two), Mobile Telecommunications Technology Corp. (one), BellSouth Wireless (one), Airtouch Paging (one) and Pagemart II, Inc. (one). Meanwhile, small businesses and minority- and women-owned companies were left empty-handed.

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[2]Id. at ¶40.

[3]Id.

[4]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-88, amending Communications Act of 1934 (codified as amended at 47 U.S.C. §§ 151 et seq.).

[5]The ten national narrowband licenses were purchased for $617 million, at an average of over $60 million per license. Mike Mills, "High Bids Surprise at Auction of Paging Licenses", The Washington Post, July 30, 1994 at A1. The Congressional Budget Office originally predicted an auction price of approximately $6 million per national license.

In this filing, Essence requests the Commission to institute the measures recommended below not only for future auctions, but immediately for the upcoming regional/narrowband auctions as well. Instituting changes immediately has the practical advantage of reducing uncertainty as to how future auctions will proceed. At this point, designated entities cannot develop an ordered bidding strategy on regional narrowband PCS because they do not know what conditions will exist for later narrowband auctions particularly in light of the Commission's proposal to reserve spectrum blocks for designated entities. Designated entities will find it difficult to distribute admittedly limited resources among the various licenses and auctions. Knowing what it now knows as a result of the July 1994 auctions, the Commission should implement the following changes immediately:

1. Modify the definition of "minority-owned business" to include firms with a maximum gross revenue of $75 million for the purpose of making them eligible for the installment payment program; and

2. Establish the "entrepreneurs' blocks", already contemplated for broadband PCS, for the October 1994 Regional Narrowband auction.

Now, before the Commission proceeds any further with the competitive bidding policy, it is time to fine tune the rules and regulations for the upcoming auctions to ensure that such the Congressional intent of §309(j)(1) is achieved and licenses are issued in an equitable and efficient manner.

II. Past Commission Practices To Encourage Minority Ownership Have Fallen Woefully Short, Particularly In The High Technology Industries.

Historically, the Commission has awarded licenses after conducting comparative hearings or lotteries. In theory, these procedures contributed to a fair allocation of licenses and diversity in ownership. Indeed, since 1965, diversity of control has been one factor considered in a comparative hearing. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394-95 (1965). Since 1978, minority ownership and participation has been considered an automatic "plus" at a comparative hearing. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 982-83 (1978). The Commission has weighed such other factors as integration of management-ownership, proposed program service, efficient use of frequency and character of applicant, rather than the applicant's bidding power. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395-99 (1965). Further, applicants paid minimal fees in order to be considered. The applicants' bidding power has never been a factor at all. This system established conditions under which, at least in theory, minorities could excel because of the importance placed on diversity.

Of course, the fairness of these procedures was undermined because, as the Commission itself has noted, "'undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation.'"[6] "Discrimination" is too antiseptic and tame a word given the real and dramatically exclusive impact. From the very beginning majority-owned firms have been given essentially free licenses (which initially were also the most valuable licenses), and minority-owned firms have been virtually shut out. In

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[6] Third Report and Order in PP Docket No. 93-253, FCC No. 94-98, 9 FCC Rcd. 2941 (1994), at ¶75 (quoting Report of the FCC Small Business Advisory Committee, reprinted at 8 F.C.C. Rcd. 7820, 7827, 7828 (1993)).

1971, minorities owned only 10 of approximately 7500 radio stations in the country, and none of the more than 1000 television stations. See, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 553 (1990)(citations omitted). In 1978, minorities owned less than 1% of this Nation's radio and television stations, and by 1986 minorities owned only 2.1% of stations in the United States. Id. By 1993, only 2.7% of commercial broadcast stations were owned by minorities. Fifth Report and Order in PP Docket No. 93-253, F.C.C. No. 94-178, 9 F.C.C. Rcd. _____ (1994), released July 15, 1994, at ¶ 107. Meanwhile, roughly one-fifth of the nation's population has been and is comprised of minorities. These startling figures are cause for concern and reason for action.

Despite Congressional and Commission efforts to bring practice more in line with theory, minority-owned firms remain nearly absent from the telecommunications field. The Commission's first efforts to enhance minority involvement in broadcasting consisted of enforcing nondiscriminatory employment policies against licensees. See Metro Broadcasting, 497 U.S. at 554 and n. 3 and citations therein. These rules forbade discrimination in hiring, mandated reporting of hiring and promotion statistics, and forced implementation of affirmative action programs. The FCC's equal employment opportunity rules addressed a specific need for greater diversity in programming, but did not reach the crucial issue of diversity in ownership.

In its 1978 Statement of Policy on Minority Ownership, the Commission instituted two programs which directly impacted minority ownership: (1) the "plus" policy for comparative hearings and (2) the "distress sale" policy. Under the "plus" policy, minority ownership became a significant advantage at a comparative hearing because it provided an automatic weighing in the minority applicant's favor. 68 F.C.C. 2d at 982. This furnished greater incentive to

minorities to apply for licenses, and thus encouraged greater minority ownership. Alternatively, under the "distress sale" policy, the Commission removed procedural barriers to license transfers by potentially unqualified licensees only when the purchaser was a minority-owned and controlled company. Id. at 983. In addition, the negotiated price had to be no more than 75% of the fair market value. Both of these policies have survived constitutional challenge and were founded by the Supreme Court to be valid procedures to promote diversity in ownership. See, e.g., Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) (decided together with Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.) Although these policies are valid, their effectiveness has been limited. Less than 3% of the broadcast stations in the country are minority-owned. Therefore, much more needs to be done to open the vaults for financing to minority entrepreneurs in the telecommunication industry, because "financing is the fuel that powers the engine down the information Super Highway". *The Information Superhighway; What Does it Mean for African America?*, "Class Magazine", August 1994 at p.44.

Broader Congressional initiatives which are not specifically aimed at the communications field but which attempt to address generally the barriers of access to capital have also fallen short of achieving meaningful change in improving minority business opportunities. For example, in 1976, Congress passed the Equal Credit Opportunity Act ("ECOA") Amendments, Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. § 1691 et seq.) The ECOA imposes a federal ban on race-based denials of extension of credit. 15 U.S.C. § 1691(a)(1). Although codified among consumer credit statutes, ECOA's ban encompasses business as well as consumer credit. S. Rep. No. 589, 94th Cong., 2d Sess.3 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405 ("Credit has ceased to be a luxury item either for consumers

or for business entrepreneurs.") The Senate Banking, Housing, and Urban Affairs Committee recognized differences between consumer and business credit. Nonetheless, it was emphatic in including all types of business credit under the prohibition, and limiting the scope of potentially necessary exemptions. Id. at 10-11. ("The purpose of the Amendment is to narrow the scope of the exemption authority. . . Congress does not intend to deny the anti-discrimination protections of the Act to minorities. . . who encounter problems of discrimination in obtaining credit to establish businesses"). In addition, past instances of discrimination against racial minorities were cited in the record.

Notwithstanding the erection of this bulwark against discrimination in financing, and the provision of a private remedy for aggrieved individuals, the rule has had limited success in reducing the barriers to entry for minority entrepreneurs to capital markets. See also, Home Mortgage Disclosure Act: Joint Hearings Before the Subcommittees on Consumer Affairs and Housing and Community Development, 102nd Cong., 2d Sess. (1992)(Comments of Office of the Comptroller of the Currency)("after thorough inquiries, we have learned of no enforcement agency, advocacy organization, or private litigant that has prevailed in recent years in an adjudication . . . alleging racial discrimination in residential lending."). Far from being evidence of decreasing discrimination, the lack of case law on this issue is testament to the fact that discrimination is difficult to show in individual cases, especially in the business context where more subjective decisions are made.

Another far-reaching Congressional initiative, the Community Reinvestment Act ("CRA"), Pub. L. No. 95-128, 91 Stat. 1147 (1977)(codified as amended at 12 U.S.C. § 2901 et seq.), addresses racial discrimination in lending practices. The CRA requires each financial

institution to demonstrate service (both credit and deposit) to the entire community in which it is chartered including low and moderate income neighborhoods. 12 U.S.C. § 2901(a). Evaluations are conducted by federal regulators under 12 U.S.C. §§ 2903 and 2906. Institutions are assigned ratings, which are published, to characterize how well the community's needs are served. 12 U.S.C. §2906. The original version of the CRA contains no language that focuses explicitly on race as an important factor in lending patterns; however, by focusing on poorer neighborhoods, that is the practical result.

Recently, Congress made the implicit goal of the CRA explicit by amending it to bolster the evaluations of financial institutions which subsidize minority banks in predominantly minority areas. Resolution Trust Corporation Refinancing, Restructuring and Improvement Act, Pub. L. No. 102-233, § 302, 105 Stat. 1761 (1991)(codified as amended at 12 U.S.C. § 2907), amended by Housing and Community Development Act, Pub. L. No. 102-550, § 909, 106 Stat. 3874 (1992). No income level controls this aspect of the CRA. It is entirely race-conscious. The CRA as a whole is now accepted as an anti-discrimination measure.[7]

Moreover, as demonstrated by the hearings held by awareness that a pervasive problem still exists with respect to minority access to credit and capital is widespread.[8]

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[7]See Paul H. Schieber, "CRA Update," 110 Banking L.J. 62, 62 (1993)(CRA "adopted . . . to address the problems faced by minorit[ies]"); Allen J. Fishbein, "The CRA After Fifteen Years: It Works But Strengthened Federal Enforcement is Needed," 20 Fordham Urb. L.J. 293, 293 (1993)(CRA "adopted . . . to curb redlining" defined as discriminatory lending based on racial composition of area).

[8]See Access to Credit in "Distressed" Communities: Hearings Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 1st Sess. 33 (1993); Discrimination in Surety Bonding: Hearings Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 1st Sess. 36 (1993); Minority Entrepreneurs' Quest to Obtain Financing: Hearings Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 1st Sess. 57 (1993); Discrimination in the Telecommunications Industry: Hearings Before the Subcomm. on Minority Enterprise, Finance and Urban Development of the House Comm. on Small Business, 103rd Cong., 2nd Sess. (May 20, 1994).