Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket Nos. 94-149 and 91-140
In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

COMMENTS OF COOK INLET REGION, INC.

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SUMMARY

The Commission, Congress and the Supreme Court have long recognized that the severe lack of diversity in the ownership of mass media facilities has a direct and negative impact on the diversity of viewpoints presented through the media. In these Comments, Cook Inlet proposes several measures to address the primary cause of the lack of ownership diversity: the difficulties that socially and disadvantaged enterprises, which include many minority-owned firms and small businesses, have in gaining access to the capital necessary to acquire broadcast licenses. The main purpose of these proposals is to offer incentives to experienced, well-capitalized businesses to assist disadvantaged entities acquire broadcast licenses and thereby increase the diversity of viewpoints presented by the mass media. Cook Inlet's proposal is to provide a helping hand, not a handout to disadvantaged entities. Moreover, qualification for the helping hand would be race and gender neutral. Under Cook Inlet's proposals, wealthy females and minorities may not qualify for help while disadvantaged persons who are not female or minorities could qualify.

In order to help disadvantaged enterprises gain access to capital, Cook Inlet urges the Commission to take the following three actions:

A. Establish An Incubation Program That Will Encourage Experienced And Better-Capitalized Broadcast And Cable Businesses To Assist Disadvantaged Firms Get Started Or Expand In The Media Industry.

B. Design Relaxation Of Ownership Restrictions And Attribution Rules To Encourage Diversity Of Ownership.

C. Urge Congress To Re-Establish A Narrowly Tailored Tax Certificate Program To Foster Ownership Diversity.

The proposals are narrowly tailored measures that will substantially assist disadvantaged enterprises gain access to the capital and experience necessary to get started in the mass media industry. In order to ensure the proposals both work as they are intended and are seen to work as intended by Congress and other observers, the proposals contain several stringent safeguards, including the requirement that the disadvantaged enterprise involved must possess at least 51% of the fully diluted equity and remain in de facto and de jure control of the broadcast licensee or cable system. Given such safeguards, the Commission and the public can be confident that the proposals will work to remedy one of the media industry's most long-standing problems and assure that genuine opportunities exist for all sectors of our society to acquire mass media facilities.

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COMMENTS OF COOK INLET REGION, INC.

I. INTRODUCTION.

Cook Inlet Region, Inc. ("Cook Inlet"), one of the 12 regional corporations established by Congress under the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 et seq. ("ANCSA"), submits these Comments to stress its belief in the importance of diverse ownership of this nation's mass

media facilities and to urge the Commission to take several concrete steps to encourage such diversity. Cook Inlet proposes several race and gender-neutral measures to assist socially and economically disadvantaged entities to acquire broadcast licenses and cable systems and thereby increase the diversity of viewpoints presented by the mass media. At the heart of Cook Inlet's proposals is the concept that established and well-capitalized broadcast and cable businesses should receive incentives to invest in and assist disadvantaged entities get started and expand in the media industry. For, what these disadvantaged enterprises need is a helping hand -- not a government handout.

Cook Inlet is owned by approximately 6,700 Native Alaskan shareholders of predominantly Athabascan, Eskimo and Aleut descent. A majority of the company's shareholders are women. Under ANCSA, and "[f]or all purposes of Federal law," Cook Inlet and each of its qualifying subsidiaries, joint ventures, and partnerships is "considered to be a corporation owned and controlled by [Alaskan] Natives and a minority and an economically disadvantaged business enterprise . . . ." 43 U.S.C. § 1626(e). Accordingly, Cook Inlet qualified as a purchaser of broadcast properties under the Commission's former Tax Certificate Policies. The Commission's Tax Certificate Policies enabled Cook Inlet to acquire properties

that probably it would not have been able to acquire otherwise.[1/]

Although use of tax certificates as a means of facilitating acquisition of broadcast and cable properties by qualified women and minorities terminated with enactment of Public Law 104-7 (109 Stat. 93-94) on April 11, 1995, the Commission has in this proceeding an excellent opportunity to act to facilitate such acquisitions by several alternative means.[2/] The Commission is also urged to recommend to Congress that it enact a revised and more carefully safeguarded tax certificate program.

II. THE LACK OF DIVERSITY OF MEDIA OWNERSHIP AND ITS CAUSES.

In the 17 years since the Commission adopted its minority tax certificate and distress sale policies in order to increase the overall representation of minorities among

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[1/] Cook Inlet acquired control of WTNH(TV), New Haven, Connecticut, on January 2, 1986, acquired control of eleven AM and FM radio stations on January 20, 1988, and acquired control of WSMV (TV), Nashville, Tennessee on June 7, 1989. Although Cook Inlet has relinquished control of these stations, it still maintains a substantial interest in WTNH (TV) through its ownership of approximately 10.5% of LIN Television which acquired the station from Cook Inlet in late 1994.

[2/] In a separate rule making proceeding, Cook Inlet has urged the Commission to encourage non-controlling foreign investments -- greater than the 25% limit established by Section 310(b)(4) of the Communications Act -- in licensees that are de facto and de jure controlled by disadvantaged enterprises. See Comments of Cook Inlet in IB Docket No. 95-22 (submitted May 12, 1995).

owners of broadcast and cable facilities,[3] the number of minorities who have acquired mass media licenses has increased but remains extremely small in both absolute and relative terms. For example, in its Notice of Proposed Rule Making in this proceeding the Commission noted that minorities constitute 23% of the national workforce but control only 2.9% of the 11,128 commercial radio and television stations on the air.[4] In other words, the share of broadcast licenses that minorities hold is only one eighth of their representation in the national workforce. We believe that most of these stations are in smaller markets and thus the effective impact of minority station ownership as compared to total population is even lower.

The Commission (and Congress) has long recognized the importance of increasing this remarkably low proportion of minority ownership if this country is to achieve the very important goal of diversity in the broadcast and cable industries. As the Commission stated in the Minority and Female Ownership Notice: "It has long been the judgment of Congress that promoting minority ownership of broadcasting and cable television facilities serves to enhance the diversity of viewpoints presented on our nation's radio and television

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[3] See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978).

[4] In the Matter of Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 94-148 and 91-140 (Released January 12, 1995) ("Minority and Female Ownership Notice").

stations and cable systems."[5] The Supreme Court, likewise, has found:

> A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group.... [T]he conclusion that there is a nexus between minority ownership and broadcasting diversity ... is corroborated by a host of empirical evidence.[6]

While the Commission is to be applauded for its recognition of the importance of minority ownership of media in its Minority and Female Ownership Notice, it is distressing to see that the Commission almost entirely ignores the issue of minority ownership in its discussion of diversity in the accompanying Notice of Proposed Rule Making In the Matter of Review of the Commission's Regulations Governing Television Broadcasting.[7] The Commission stresses its "concern for ensuring diversity of viewpoints in the material presented over the airwaves,"[8] yet it seems to define diversity solely in terms of the sheer number of different stations (outlet diversity) or program producers (source diversity). Nowhere in the lengthy discussion does the Commission address

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[5] Id. at 2.

[6] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 579-80 (1990).

[7] MM Docket No. 91-221 (Released January 17, 1995) ("Television Broadcasting Regulations Notice").

[8] Id., p. 24.

diversity in terms of the opportunities available to all Americans to own stations or produce programs.

It is vital that the Commission recognize that diversity means more than large numbers of separately owned licensees. True diversity means that the different groups in society have a genuine opportunity to acquire media licenses. For, only when all sectors of our society have the genuine opportunity to acquire licenses will this country be able to enjoy a true diversity of viewpoints in its media.

In order to foster genuine diversity of ownership in the media industry, the Commission must devise policies that will offer ownership opportunities to the sectors in our society that have historically faced the greatest difficulties in acquiring media licenses. If they are to be effective, such policies must directly address the central barrier to diversity of media ownership: socially and economically disadvantaged enterprises' lack of access to capital.

As has been extensively documented by the Commission, socially and economically disadvantaged enterprises (which include many minority enterprises and small business) face great difficulties in attracting the capital necessary to obtain broadcast licenses. As the Commission noted in its Minority and Female Ownership Notice: "In the years since the Commission and Congress began studying the issue of minority ownership, considerable evidence has been presented showing that the primary impediment to minorities

seeking to enter the communications industry or to increase their mass media holdings is a lack of access to capital."[9] In that Notice, the Commission emphasized that Congress in passing the Small Business Credit and Business Opportunity Enhancement Act of 1992 specifically found minorities to have "extraordinary" difficulties in obtaining capital.[10]

The difficulties that small businesses have in attracting the capital necessary to obtain broadcast licenses have not been as well-documented as those facing minorities. Nevertheless, in including small businesses as Designated Entities in the auction of spectrum for Personal Communications Services in the 2 GHz band, the Commission did accept the finding that Congress made in the Small Business Credit and Business Opportunity Enhancement Act of 1992 that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[11] With the obstacles they face in obtaining credit, small businesses often find it quite hard to amass the large amounts of capital

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[9] Minority and Female Ownership Notice, p. 8.

[10] Id., quoting the Small Business Credit and Business Opportunity Enhancement Act of 1992, 15 U.S.C. § 631 note, Pub. L. No. 102-366, 106 Stat. 986 §§ 112(4), 331(a)(4).

[11] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, in PP Docket No. 93-253, FCC 94-178, Federal Register, Vol. 49, No. 140, p. 37582 (July 22, 1994), quoting Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. Law 102-366 (Sept. 4, 1992).

necessary to acquire broadcast licenses and cable systems. It is important to ensure that small businesses, since they represent one of the most diverse and vibrant sectors of the national economy, not be prevented by their lack of access to capital from helping to diversify the ownership of the broadcast and cable industries.

III. COOK INLET'S PROPOSALS.

In light of the necessity of increasing the access of disadvantaged enterprises to capital and aware of today's political and judicial currents of opinion, Cook Inlet makes the following recommendations:

A. The Commission Should Establish An Incubation Program That Will Encourage Experienced And Better-Capitalized Broadcast And Cable Businesses To Assist Disadvantaged Firms Get Started Or Expand In The Media Industry.

B. The Commission Should Design Relaxation Of Its Ownership Restrictions And Attribution Rules To Encourage Diversity Of Ownership.

C. The Commission Should Urge Congress To Re-Establish A Narrowly Tailored Tax Certificate Program To Foster Ownership Diversity.

A. The Commission Should Establish An Incubation Program.

The purpose of an incubation program is to encourage experienced and better-capitalized broadcast and cable businesses to assist smaller, less well-capitalized firms get started or expand in the media industry. The central requirements of the incubation program would be for the

"Incubator" broadcast or cable company to provide the "Incubatee" broadcast station or applicant or cable operator with both capital and technical or managerial assistance. Only those individuals or entities which could qualify -- on a race and gender neutral basis -- as socially and economically disadvantaged under rules similar to those contained in Section 8(a) of the Small Business Administration (see Section III.1 below) would be eligible to qualify as an Incubatee.

With regard to Incubators, the incentives for them to participate and invest their capital would be twofold. First, their investment in an Incubatee would not be attributable to them for the purposes of local or national ownership limits. Second, the Incubator would be rewarded for participating in the program by being able to obtain an attributable interest in an additional broadcast license (in excess of the national or local limit) in a market that is commensurate in size to the market in which it is participating in the incubation program. The elements of the proposed program are described in detail below.

1. Qualifications of Incubatee.

In order to participate as an Incubatee, the broadcast licensee or applicant or cable system would have to satisfy certain criteria of social and economic disadvantage. The concept of social and economic disadvantage is one long-established by the Small Business Administration under Section

8(a) of the Small Business Act.[12] The concept is rooted in the extensively documented difficulties that certain persons have in obtaining financing and otherwise getting started in the business world. As applied by the Small Business Administration, a person of any race can qualify as socially and economically disadvantaged; in order to qualify, a person must demonstrate both social and economic disadvantage. Hence, wealthy individuals from minority groups may not qualify, while economically disadvantaged persons from non-minority groups may qualify if they can also prove social disadvantage.

According to the Federal Regulations issued pursuant to Section 8(a), social disadvantage is defined as follows:

> 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.[13]

In addition to social disadvantage, an individual must show economic disadvantage:

> For purposes of the 8(a) program, 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 who are not socially

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[12] 15 U.S.C. § 637(a).

[13] 13 C.F.R. § 124.105(a).

> disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.[14]

While the Commission may choose to modify these standards, Cook Inlet believes that focusing on the social and economic disadvantage of the particular person or entity concerned (as opposed to blanket preferences for certain minority groups) is both more equitable and more likely to pass political and judicial muster.

2. **Qualifications of Incubator.**

To participate as an Incubator, a firm would have to fulfill two main requirements: (a) contribution of equity and (b) meaningful technical or managerial assistance.

a. **Incubator contribution of equity.**

In order for the program to assist Incubatees obtain the capital to acquire licenses, Incubators would be required to contribute a substantial capital investment in the form of equity. Cook Inlet proposes that Incubators be required to contribute a minimum of 25% of the fully diluted equity of the Incubatee. Alternatively, if the Incubatee makes a strong showing of need for non-equity capital assistance, an Incubator could also qualify by contributing 10% of the fully diluted equity plus other forms of financial assistance that with the equity would total at least 25% of fully diluted capital. Other forms of financial assistance to an Incubatee

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[14] 13 C.F.R. § 124.106(a)(1)(i).

could be, for example, substantially below market rate interest loans or loan guarantees.

b. Managerial or technical assistance by Incubator.

In addition to investment of capital, an Incubator would also be required to contribute meaningful managerial or technical assistance to the Incubatee. Since the purpose of the incubation program is to leverage not only the capital but also the expertise of established companies for the benefit of new entrants, Incubators should be prepared to devote substantial help to the Incubatees in areas such as non-investment financial assistance, station management, personnel training, technical advice, and access to studio and broadcast facilities. It is not practicable firmly to establish quantifiable standards for such assistance in advance, yet the Commission should make clear that only genuine assistance of a meaningful and ongoing nature -- to be evaluated on a case-by-case basis -- would qualify the Incubator for eligibility in the program. Of course, the nature and amount of "assistance" by an Incubator must not constitute "control" of the Incubatee or undermine the Incubatee's de facto and de jure control.

3. Benefits for Incubators.

In order to encourage established companies to participate as Incubators, Cook Inlet proposes that the Commission offer three sets of incentives. The first set would be non-attribution of any of the Incubator's interests in the Incubatee. The second set would be relaxation of the

Commission's local and national ownership limits for the Incubator to a degree commensurate with the incubation project undertaken. And, the third set would be for the Commission to urge Congress to authorize the issuance of tax certificates for Incubators upon sale of all or part of their equity investments in the Incubatee.

a. Non-Attribution of interests.

The station in which an Incubator invests should not be counted against the Incubator for the purposes of local or national station ownership limits. Thus, the Commission would not apply its ownership attribution or cross-interest rules in the case of an Incubatee station. In addition, the Incubator and Incubatee would not be restricted as to the amount of time they could share if they wished to participate in a local marketing agreement (LMA). Safeguards against abuse of such a system are discussed below in Section III.A.4.

b. Relaxation of national and local ownership limits.

In recognition of the importance of the incubation program, an Incubator should be allowed to exceed relevant national or local ownership caps to a degree commensurate with the incubation project to which they contribute. In simple terms, Incubators should be allowed to exceed national or local ownership caps by one station for each station they incubate. Any additional station that the Incubator is thus able to acquire must be comparable to the station which it incubates in terms of market size and type of facility.

In order to ensure that the Incubator's ability to add a local station above current ownership caps (e.g., a third FM station in one market) does not raise fears of undue concentration of local ownership, Cook Inlet proposes that an Incubator only be able to have an attributable interest in a third AM or FM radio station in a local market if that market has more than 15 stations. If the market has less than 15 stations, no Incubator should be allowed to have attributable interests in more than half the stations in that market. With regard to television, apart from any LMA interest, an Incubator could not have an attributable interest in more than two stations in any market with fewer than six stations.

While the Commission may fear that allowing Incubators to exceed local ownership caps works against its diversity goals, Cook Inlet urges the Commission to view diversity from the perspective not only of the number of separate licensees but the actual diversity of those licensees. It would seem that allowing an Incubator to exceed local ownership caps by one station is an acceptable means for opening mass media ownership opportunities to a broader section of our society. The gain in diversity that will result from such new opportunities certainly exceeds any potential loss of diversity caused by allowing licensees an additional station in certain markets.

c. **A revised program of tax certificates.**

As an additional incentive to attract capital to the incubation program, the Commission should urge Congress to enact a narrowly tailored tax certificate statute to replace 28 U.S.C. § 1071 that was repealed earlier this year. Under such a tax certificate statute, Incubators would receive a tax certificate to defer capital gains if they sold their stake in the incubated station or cable system to the Incubatee or a third party after a certain minimum time period (such as three years). Any such tax certificate would be issued by the IRS together with the FCC. The strict safeguards on the incubation program (described below in the next section) would prevent against the type of "pyramided" transactions that evoked such a hostile political response to the recent Viacom case and the § 1071 program.

4. **Safeguards for the incubation program.**

Cook Inlet proposes that the Commission establish strict safeguards that will ensure that the incubation program not only works as intended but is seen to be working as intended by outside observers. Cook Inlet believes that the following proposals are both eminently fair and workable.

(a) De Jure and De Facto Control: Any Incubatee must possess both de jure and de facto control of the licensee for the station to be incubated or the owner of the cable system to be incubated. The Incubatee should

possess at least 51% of the fully diluted equity of the incubated licensee, and no options, puts, or calls should be permitted.

(b) Sunset Provision: Unless the Commission finds that the incubation program has meaningfully contributed to ownership diversity after three years, the program will be terminated.

(c) Tax Certificate Ceiling: No Incubator could receive a tax certificate from the program to defer a gain in excess of $50 million.

(d) Participation of the IRS: Tax certificates would be granted by the Internal Revenue Service together with the Commission.

(e) Strict enforcement of provisions and penalties for violations: The Commission should institute broader disclosure requirements, more vigorous enforcement and strict penalties, including the possibility of license revocation, for parties that violate the rules of this incubation program.

5. Status of Incubator at the end of the incubation program.

If an Incubator has fully maintained its incubation role with respect to a particular Incubatee for at least three years after the Incubatee acquired the incubated station or

cable system, the attribution and ownership cap exceptions, if any, granted to the Incubator, shall thereafter be grandfathered until the Incubator disposes of any such grandfathered station.

B. The Commission Should Refrain From Applying Its Ownership Restrictions And Attribution Rules Where Necessary To Foster Diversity Of Ownership.

In addition to the establishment of an incubation program, the Commission should create further incentives to encourage businesses to invest in socially and economically disadvantaged concerns and to allow those concerns to compete more effectively in the market. Two effective incentives would be: (1) to relax or refrain from applying the attribution rules and cross-interest policies where a company invests in a disadvantaged enterprise (on a level insufficient to qualify as an incubator) and (2) to relax ownership restrictions for disadvantaged enterprises.

1. Relax or refrain from applying attribution rules to foster ownership diversity.

There are certain to be cases in which broadcast companies may wish to invest in or provide assistance to disadvantaged enterprises at a level below the level required for them to qualify under the proposed incubation program. The Commission should implement measures to encourage such forms of investment and assistance as further means to foster diversity. Cook Inlet therefore proposes that where a

relax or refrain from applying its attribution rules in four respects:

(a) Stockholding benchmarks: The Commission should double the permissible ceiling for passive and active investors if the investment is in a disadvantaged enterprise. (Current benchmarks are 5% of voting stock for active investors, 10% for passive investors.)[15/]

(b) Limited Partnerships: The Commission should relax or refrain from applying its limited partnership attribution rules, particularly its insulation criteria,[16/] where the controlling general partner is a disadvantaged enterprise.

(c) Cross-Interests: The Commission should refrain from applying its cross-interest policies where to do so would enable a disadvantaged enterprise to benefit from training or expertise offered by another broadcast licensee.

(d) Local Marketing Agreements (LMA's): The Commission should allow a disadvantaged enterprise to enter into an LMA with another licensee with a time limit twice that ordinarily allowed. (Current rules on radio LMA's limit the amount of time shared

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[15/] Notice of Proposed Rule Making in MM Docket Nos. 94-150, 92-51, 87-154 (Released January 12, 1995) "Attribution of Broadcast Interests Notice," p. 10.

[16/] Id., p. 29.

to 15% of a brokered station's weekly broadcast hours.)[17]

2. Relax ownership restrictions for disadvantaged enterprises.

At present, minority-owned enterprises are allowed to exceed slightly the national ownership limits in both television and radio.[18] Such an advantage is of little use to disadvantaged enterprises, which by their nature rarely possess holdings large enough to bump up against the national ownership limits. Relief from local same service or cross service ownership limits, however, could be of substantially greater use to disadvantaged enterprises. The prospect of an entity's acquiring interests in 3 FM stations in a particular market, for example, or in both a television and a radio station, might enable a disadvantaged enterprise to attract capital that would not otherwise be available.

Cook Inlet therefore urges the Commission to permit disadvantaged enterprises to obtain an additional radio license above the limit for non-disadvantaged enterprises in local markets of sufficient size. A disadvantaged enterprises should be permitted to hold 3 AM and 3 FM radio stations as long as the local market has more than 12 stations. In

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[17] Television Broadcasting Regulations Notice, p. 59.

[18] Minorities may hold up to 14 television licensees with an aggregate audience reach of up to 30%; non-minorities may hold up to 12 television licenses with an aggregate audience reach up to 25%. In radio, minorities may own 25 AM and 25 FM stations; non-minorities may own 20 AM and 20 FM stations. Minority and Female Ownership Notice, pp. 4-5.

markets of fewer than 12 stations, a disadvantaged enterprise would not be permitted to control more than half of the radio stations. If as a result of this proceeding, the Commission's local ownership limits are increased, the limits for disadvantage enterprises should be raised accordingly.

C. The Commission Should Urge Congress To Enact A Narrowly Tailored Tax Certificate Law.

In the proposals outlined above, Cook Inlet has suggested measures which would assist disadvantaged enterprises to attract capital and assistance from experienced, well-capitalized broadcast and cable companies. It is important, however, to go beyond these measures and introduce policies that will assist disadvantaged enterprises to attract capital from additional sources. Cook Inlet therefore urges the Commission to ask Congress to enact a narrowly tailored tax certificate statute that would replace the recently repealed 28 U.S.C. § 1071 and offer tax certificates to (1) broadcast and cable companies that sell their facilities to a disadvantaged enterprise and (2) investors who provide start-up capital to a disadvantaged enterprise. This would be in addition to the tax certificate aspects of the incubator program described in Section III-A.3.c, *supra*.

1. Sale of broadcast or cable facilities to a disadvantaged enterprise.

Broadcast licensees and cable operators that sell their facilities to a socially and economically disadvantaged enterprise should be granted a tax certificate that would