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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

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To: The Commission

PETITION FOR RECONSIDERATION OF
COLUMBIA CELLULAR, INC.,
NATIONAL COUNCIL OF LA RAZA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, AMERICAN HISPANIC OWNED RADIOASSOCIATION, OPPORTUNITIES NOW ENTERPRISES, INC., INTEGRATED VOISYS, ONDAS COMMUNICATIONS SERVICES, INC., AND CALCELL, INC.

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Date: August 21, 1995

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Summary

Petitioners herein urge the Commission to vacate the Sixth Report and Order and reinstate the minority assistance program for the upcoming C block auction. Petitioners believe that the decision to eliminate the minority assistance program was hastily made in response to an administrative overreaction to the U.S. Supreme Court decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), and thus must be reconsidered.

As demonstrated in the attached petition, the minority assistance program will pass constitutional muster under Adarand's strict scrutiny standard of review. First, the program serves a compelling government interest -- the alleviation of economic discrimination in the capitalization of the telecommunications marketplace. Second, the means of achieving this goal are narrowly tailored due to the fact that (1) the Commission has considered and rejected race-neutral measures; (2) the minority assistance program is just a single factor at play in the entrepreneurs' blocks auctions -- the program alone in no way guarantees a minority applicant a license; (3) the minority assistance program is of a very limited duration; and (4) the burden, if any, imposed on non-minority applicants is negligible.

The record is clear that minority-owned businesses suffer from economic discrimination. This discrimination is most apparent in lending discrimination -- a fact explicitly acknowledged by Congress and the Commission. Without the availability of the Commission's minority assistance program to help obtain investment capital, minority-owned companies will not be able to raise the necessary revenue to compete with their non-minority counterparts in the PCS auctions. The exclusion of minority-owned companies from the PCS marketplace will directly contravene the Commission's congressional mandate to ensure that members of minority groups are given the opportunity to participate in the provision of wireless services.

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To: The Commission

PETITION FOR RECONSIDERATION

CalCell, Inc., Columbia Cellular, Inc., Integrated Voicsys, Ondas Communications Services, Inc., Opportunities Now Enterprises, Inc., the American Hispanic Owned Radio Association, the League of United Latin American Citizens, and the National Council of La Raza (collectively, the "Petitioners") by their attorney and pursuant to Section 1.429 of the Commission's Rules, hereby petition the Commission to reconsider its Sixth Report and Order, FCC 95-301 (July 18, 1995), in the above-captioned proceeding. The Sixth Report and Order eliminated the minority assistance program from the Commission's competitive bidding rules for the C block auction of Personal Communications Services in the 2 GHz band ("broadband PCS"). As demonstrated below, the Sixth Report and Order violates Section 309(j) of the Communications Act, which directs the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." The assistance

that was available to members of minority groups in the broadband PCS C block auction prior to the adoption of the Sixth Report and Order would pass constitutional muster under the "strict scrutiny" standard of review as promulgated in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

I. BACKGROUND

A. The Parties

CalCell, Inc. ("CalCell"), Columbia Cellular, Inc. ("Columbia"), Integrated Voicsys ("Integrated"), Ondas Communications Services, Inc. ("Ondas"), and Opportunities Now Enterprises, Inc. ("O.N.E.") are each corporations that intended to participate in the C block auction as minority-owned and controlled entities. The company's shareholders are United States companies and citizens, the majority of whom are minority shareholders or minority-owned and controlled businesses or organizations. As minority-owned and controlled entities, each is qualified for the Commission's minority assistance program, as well as the small business assistance, in the upcoming C block auction.

The American Hispanic Owned Radio Association ("AHORA") is a not-for-profit trade association of Hispanic broadcasters. AHORA works to improve business opportunities for Hispanic American broadcasters, increase the number of Hispanic American broadcasters, promote a higher appreciation of the Spanish-language media in the United States, promote the interests of the Hispanic community of the United States so as to ensure fair and equal treatment, provide a link between Hispanic Americans and the peoples of other nations of Hispanic origin, and protect the overall interests of the Hispanic American broadcast and communications industry.

The League of United Latin American Citizens ("LULAC") is the oldest and largest Hispanic organization in the United States. Founded in 1929, LULAC was created to defend and protect the civil rights of Hispanics in the United States. Today, LULAC represents more than 100,000 members. Since its creation, LULAC has been at the forefront of civil rights battles, which continue to shape U.S. public policy. LULAC is also a national leader in the effort to improve the quality of education, especially in Hispanic school districts. Further, LULAC works to improve the economic conditions of its members by, inter alia, developing job programs.

The National Council of La Raza ("NCLR") is a private, not-for-profit corporation dedicated to reducing discrimination and improving economic opportunities for Hispanic Americans. NCLR is the nation's largest constituency-based Hispanic organization, which serves more than two million Hispanics across 38 states, Puerto Rico, and the District of Columbia. NCLR has in the past represented Hispanic Americans before the Commission.

Separately and together, CalCell, Columbia, Integrated, Ondas, O.N.E., AHORA, LULAC, and NCLR have a vested interest in ensuring that the nation's exclusive telecommunications industry -- which is almost completely controlled by non-minority Americans[1/] -- is at long last opened to under-represented ethnic minorities in the United States. It should be noted that a number of the Petitioners or their principals participated in the earlier PCS proceedings.

1/ See R. Suarez and R. Cull, Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industry, Staff Paper, United States Department of Commerce, National Telecommunications and Information Administration, Office of Policy Analysis and Development (April 1995) ("NTIA Study"), at 1 (citing a 1991 study, Symbiont, Inc., A Market Analysis of the Telecommunications Industry -- Opportunities for Minority Businesses, Developed for the U.S. Dept. of Commerce, Minority Business Development Agency (August 20, 1991), which found that less than one percent of the nation's telecommunications companies were minority owned), attached hereto as Exhibit A.

B. The History

The record is clear -- minority-owned businesses in the United States suffer economic discrimination on a daily basis, based on the fact that they are members of a minority group. An in-depth study conducted by order of the Texas Legislature to determine the impact of race discrimination on minority-owned companies, attached hereto as Exhibit B, determined that while all minority-owned businesses suffer from discrimination, African-American and Hispanic businesses are the most economically disadvantaged by prejudice.[2] The study found that minority-owned enterprises are not able to attract as much business as non-minority companies and are paid less than non-minority companies when they do get work.[3] A key finding of the study was that minority-owned companies had a significantly more difficult time in obtaining capital from financial institutions than their non-minority counterparts because of racial prejudices -- a fact that often thwarted their chances of financial success.[4]

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[2] National Economic Research Associates, Inc., State of Texas Disparity Study: A Report to the Texas Legislature as Mandated by H.B. 2626, 73rd Legislature (December 1994), at ix, xi. For the purposes of the study, minorities included African Americans, Hispanics, Native Americans, and Asians (including Asian Pacific, Asian Indian, and Asian Islanders). Id. at x, attached hereto as Exhibit B.

[3] Id. at 120.

[4] Id. at 139, 151. Thirty-four percent of African American-owned companies, 17.3 percent of Hispanic-owned companies, 15.8 percent of Native American-owned companies, and 13.4 of Asian-owned companies reportedly experienced discrimination in obtaining commercial credit. Id. at 140. This compares to 26.7 percent of business owners in the largest minority community in San Antonio, Texas who claimed that racial discrimination was the reason that their bank loans were denied. The Tomas Rivera Center, A National Institute for Policy Studies, 1990 Business Survey of the Greater "Westside" (1990), at 10, attached hereto as Exhibit C. A further study of the economic discrimination faced by minority-owned businesses in San Antonio discovered that only eight percent of city government contracts were awarded to minority-owned businesses despite the fact that more than 60 percent of residents are members of minority groups. Lyndon B. Johnson School of Public Affairs, The University of Texas at Austin, The Economy of the Urban

(continued...)

The situation has been exacerbated by the recent hikes in interest rates -- rates that have increased seven times in 16 months. According to one study, attached hereto as Exhibit E, the rise in interest rates have an especially detrimental effect on minority-owned businesses.[5]

Another study, conducted by NCLR and attached hereto as Exhibit F, concluded that lack of access to investment capital from institutional lenders "is a major problem for aspiring Hispanic entrepreneurs."[6] The study estimates that minorities in the United States control less than one percent of the country's investment capital, even though minorities comprise a significantly larger portion of the population.[7]

Congress, like the Petitioners, long ago realized that the country's booming telecommunications industry largely excludes minority member participation. Congress found that one of the primary impediments to minority participation is the fact that "minority-owned business enterprises have found extraordinary difficulties in obtaining credit."[8] In an effort to help pry open the market and avoid "excessive concentration of licenses" by any single group,

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[4] (...continued)
Ethnic Enclave (1991), at 126, attached hereto as Exhibit D.

[5] The Greenlining Institute, A War on Inflation or a War on the American Economy and Minority Dream: A Report on the Adverse Impact of High Interest Rates on Minorities and Small Businesses (June 1995), attached hereto as Exhibit E (noting that increased interest rates creates severe obstacles to minority business development and expansion), at Section 7.

[6] National Council of La Raza, Hispanic Business Ownership: A Profile (September 1987), at 25, attached hereto as Exhibit F.

[7] Id. Another NCLR study, attached hereto as Exhibit G, says that part of the problem that Hispanics face in the U.S. marketplace may stem from the negative portrayal of Hispanics in the entertainment and news media. National Council of La Raza, Out of the Picture: Hispanics in the Media (August 1994).

[8] Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. 102-366, § 331(a)(4) (1992).

Congress ordered the FCC to give minority-owned businesses a meaningful chance to participate in the PCS auctions.[9] In its Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[10] Congress told the Commission to consider such provisions as tax certificates, bidding assistance, and other procedures to achieve this goal.[11]

The Commission, through a series of rule making proceedings, worked to fulfill its congressional mandate. In its Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) ("Fifth Report and Order"), the Commission adopted competitive bidding rules designed to promote minority participation, as well as participation by other designated entities, in the broadband PCS auction. Specifically, the Commission:

(1) established two "entrepreneurs" blocks (frequency blocks C and F) in which large

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[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, § 6002(j)(3)(B), 107 STAT. 388 (1993).

[10] Id. at § 6002(j)(4)(D). Small businesses, rural telephone companies, and businesses owned by members of minority groups and women are known collectively as "designated entities."

[11] Id. It should also be noted that the Commission has recognized this access-to-capital problem for more than two decades in other communications-related industries. Former FCC Commissioner Henry Rivera chaired an FCC committee and made specific recommendations addressing this problem. The National Association of Broadcasters ("NAB") established an entity entitled BROADCAP. This entity, a United States Small Business Administration licensed MFSBIC, is specifically chartered to help minority-owned companies find critical financing in order to acquire broadcast properties. Unfortunately, these efforts have been inadequate in light of the pervasive economic discrimination that minority-owned companies face in accessing capital.

companies, i.e., companies with $125 million or more in annual gross revenues or $500 million or more in total assets, would be prohibited from bidding;

(2) granted bidding credits to small businesses and businesses owned by women and minorities in the entrepreneurs' blocks in order "to provide them with a better opportunity to compete successfully" in the auctions; and

(3) adopted a tax certificate program for minority and women-owned businesses, providing them with "additional assistance in their efforts to attract equity investors."[12]

The Commission later clarified its rules in the Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket 93-253, 10 FCC Rcd 403 (1994), ("Fifth MO&O"). Noting that "its primary objective on reconsideration [was] to ensure that [its] rules promote diversity and competition in the PCS marketplace," the Commission, inter alia, refined its regulations in an effort to allow minority businesses to more easily attract elusive investors. Fifth MO&O, AT ¶ 6.

Although the Commission wanted to ensure that minority-owned companies had a "realistic opportunity" to compete in the PCS auctions, it realized that minority-owned businesses face institutional lending discrimination. Fifth Report and Order, at ¶¶ 9, 10. Throughout its rule making proceedings, the Commission focused on the well-documented inability of most minority-owned enterprises to attract the necessary capital to effectively compete in the telecommunications marketplace. In various orders released during this proceeding, the Commission cited numerous examples of the economic discrimination that minorities face, including a study that demonstrated that an African American or Hispanic

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[12] Fifth Report and Order, at ¶ 113. The tax certificate program was later repealed by Congress. Pub. L. No. 104-7, § 2, 109 STAT. 93, 94 (1995).

Boston resident was roughly 60 percent more likely to be denied a mortgage loan than a similarly situated non-minority resident. Id. at ¶ 98. The Commission stated that Congress "could reasonably assume, based on the Boston study, and its legislative experience regarding discriminatory lending practices, that minority applicants for licenses issued in spectrum auctions would face substantial (albeit subtle) barriers to obtaining financing." Id. at ¶ 99. Furthermore, the Commission proclaimed that "[a]ny legal remedies, even if effective, would...come too late to ensure that minorities are able to participate in spectrum auctions and obtain licenses." Id.

Following these observations, cited in the Fifth Report and Order, the Fifth MO&O, and other orders, that minority applicants face significant barriers in obtaining financing, and its promulgation of rules to help alleviate economic discrimination in the telecommunications industry, the Commission moved forward with its planned execution of the C block auction, which was scheduled to take place on August 2, 1995.[13] However, on June 12, 1995, just three days before the applications for the PCS C block auction were due, the United States Supreme Court handed down its decision in Adarand, which held that Federal programs which make distinctions based on race must be analyzed under a strict scrutiny standard. The next day, in order to evaluate the impact of the Adarand decision, the Commission once again postponed the

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[13] The auction had been postponed once before by the Commission following an order by the U.S. Court of Appeals for the District of Columbia Circuit in Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. Mar. 15, 1995). The appeals court had issued a stay of the portions of the Commission's rules which established minority and gender assistance and employed the assistance program in the application process. Id. After the court's stay was later lifted following a motion by Telephone Electronics Corp. to withdrawal its appeal of the Commission's orders, the Commission set August 2, 1995 as the new auction date. See Public Notice, Auction Dates for 493 BTA Licenses Located in the C Block for Personal Communication Services in the 2 GHz Band (May 1, 1995).

filing of the applications for the C block auction.[14]

Soon thereafter, the Commission issued its controversial Further Notice of Proposed Rule Making, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-263 (June 23, 1995) ("FNPRM"), in which it proposed to eliminate its minority and women-based assistance for the C block auction, presumably in light of Adarand. Notwithstanding this proposal, the Commission claimed a continued commitment to the mandates and objectives of the Budget Act. Ironically, at no time did the Commission suggest that its C block auction rules could not pass muster under Adarand. FNPRM, at ¶ 11.

The Commission established July 7, 1995 as the due date by which the public could file comments on the proposal to eliminate the minority assistance program. This gave commenting parties only seven days to file comments. No period was allowed for the filing of reply comments. Id. at ¶ 2.

In what appears to have been an accurate anticipation of administrative overreaction to the Adarand decision, and just five days after the Commission released its FNPRM, the United States Department of Justice issued a memorandum to General Counsels of the country's administrative agencies. Memorandum to General Counsels, U.S. Dept. of Justice, Office of Legal Counsel (June 28, 1995) ("DOJ Memorandum"), attached hereto as Exhibit H. In the DOJ Memorandum, the Justice Department detailed the course that administrative agencies should follow in deciding whether to eliminate their race-based provisions in the wake of Adarand. The DOJ Memorandum repeatedly stated that although Adarand made applicable to Federal affirmative action programs the strict scrutiny standard of review that City of Richmond v. J.A.

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[14] See Public Notice, FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band (June 13, 1995).

Croson Co., 488 U.S. 469 (1989), applied to state and local affirmative action programs, Adarand held one important caveat -- that Congress may be entitled to greater deference than state and local governments in determining whether affirmative action measures are necessary. DOJ Memorandum, at 1, 9, 30. Further, the DOJ Memorandum stressed that "a majority of Justices rejected the proposition that 'strict scrutiny' of affirmative action measures means 'strict in theory, fatal in fact,' and agreed that 'the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country' may justify the use of race-based remedial measures in certain circumstances. Id. at 1 (quoting Adarand, 115 S.Ct. at 2117). Finally, and perhaps most significantly, the DOJ Memorandum urged that "no affirmative action program should be suspended prior to...an evaluation" under Adarand. Id. at 34 (emphasis added).

Despite the Justice Department's advice, on July 18, 1995, the Commission released its Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Sixth Report and Order, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-301 (July 18, 1995) ("Sixth Report and Order"), eliminating the minority and women-based assistance program for the C block auction. The Commission based its hasty decision to eliminate rules that it had worked two years to promulgate on its fear that if it did not take action immediately the rules would face legal challenge, thus resulting in further delay of the auction. See id. at ¶ 11.

The day after the release of the Sixth Report and Order, President Bill Clinton issued a Memorandum for Heads of Executive Departments and Agencies, Evaluation of Affirmative

Action Programs, President William J. Clinton (July 19 1995) ("White House Memorandum"), attached hereto as Exhibit I. The President specifically instructed agency heads to "undertake, consultation with and pursuant to the overall direction of the Attorney General, an evaluation of programs you administer that use race or ethnicity in decision making." White House Memorandum, at 2.

II. DISCUSSION

A. Minority Businesses Face Economic Discrimination

Congress has demonstrated, and the Commission has agreed, that minority-owned companies face economic discrimination, especially in the telecommunications industry. There is no single greater impediment to the ability of minority-owned companies to enter the telecommunications marketplace than a lack of capital. Indeed, according to the Commission itself, "[t]he record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. This impediment arises for small businesses from the higher costs they face in raising capital, and for minority and female-owned businesses from lending discrimination as well. In this regard, it should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services." Fifth Report and Order, at ¶ 10. In an effort to ameliorate the economic discrimination faced by minority-owned companies in the telecommunications industry, the Commission, with the explicit guidance of Congress, promulgated its minority assistance program over a period of more than two years.

The Commission's two-year effort was suddenly put into legal limbo, as least as the Commission viewed it,[15] by the Supreme Court's Adarand decision. Faced with the fast-approaching application deadline, the Commission abruptly halted the application process in response to Adarand.[16] Then, in its rush to restart the application and auction processes, the Commission hastily decided to eliminate the minority assistance program instead of first evaluating whether the program would withstand judicial scrutiny.[17] The Commission did this despite Department of Justice advise that agencies should avoid suspending, much less eliminating, affirmative-action-type programs prior to an Adarand evaluation.[18] The Commission's hasty decision to throw out its minority assistance program is precisely the type of knee-jerk reaction that the Justice Department feared in its cautionary note. As such, the Commission's action was premature and must be reconsidered, because, as demonstrated below, the minority assistance program does in fact pass constitutional muster.

B. The Commission's Minority Assistance Procedure Passes Constitutional Muster

Adarand made applicable to Federal affirmative-action-type measures the same standard of review, strict scrutiny, that Croson applied to state and local affirmative action programs. However, under Adarand congressionally mandated affirmative action programs may be entitled to greater deference than state and locally imposed affirmative action measures.

15/ See FNPRM, at ¶ 1 (addressing the "legal uncertainties" raised by Adarand").

16/ See Public Notice, FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band (June 13, 1995).

17/ See Sixth Report and Order.

18/ See DOJ Memorandum, at 34.

Significantly, Justice O'Connor, the author of Adarand, rejected the notion that "strict scrutiny is 'strict in theory, but fatal in fact." Adarand, 115 S.Ct. at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (Marshall, J., concurring in judgement)). According to Justice O'Connor, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Id.

Under the strict scrutiny standard, race-based classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest. Adarand, 115 S.Ct. at 2117. This is the same standard of review that was applied to state and local affirmative action programs in Croson -- an opinion also delivered by Justice O'Connor. A step-by-step analysis of Adarand, Croson, and other relevant cases demonstrates that the Commission's minority assistance (i) serves a compelling government interest -- the alleviation of economic discrimination against minorities, and (ii) is narrowly tailored to further that interest due to the fact that the Commission considered and rejected race-neutral alternatives, the minority assistance program is just one factor in a PCS applicant's attempt to obtain a license, the minority assistance program is of an extremely limited duration, and the burden imposed on non-minorities by the program is negligible.

1. The Commission's Minority Assistance Procedure Serves a Compelling Interest

The first step in the Adarand analysis is to determine whether the Commission's minority assistance program -- which was mandated by Congress -- serves a compelling government interest.[19] The remedial objective of the minority assistance program, i.e., the alleviation of

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[19] It should be stressed that Congress' determination that minority-owned companies face discrimination in lending is apparently entitled to deference by the courts. See Adarand, (continued...)

economic discrimination in the capitalization of the telecommunications marketplace, satisfies the Court's standard.

Under Croson, although a "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis...there is no doubt that 'where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.'" Croson, 448 U.S. at 501 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 307-308 (1977).

Minority participation in the telecommunications arena is almost null. According to the U.S. Commerce Department, less than one percent of the nation's telecommunications companies are minority owned.[20] A brutally clear testament to this reality is the fact that in the broadband PCS auctions so far, not a single licensee in the A or B blocks is a minority or minority-owned company. In the narrowband auction, only one minority applicant obtained any licenses, despite the fact that minority-owned companies received 40 percent bidding discounts.

The reason for the economic disparity, as Congress has determined, is that "minority-owned business enterprises have found extraordinary difficulties in obtaining credit."[21] The Commission itself has determined that "the primary impediment to participation by designated entities is lack of access to capital." Fifth Report and Order, at ¶ 10. The principal reason that minorities cannot access adequate capital, according to the Commission and Congress, is lending discrimination. Id.; see also, supra notes 1-7 and accompanying text.

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[19] (...continued)
115 S.Ct. at 2114; and Croson, 497 U.S. at 507.

[20] Supra note 1, NTIA Study, at 1.

[21] Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(4), Pub. L. 102-366 (1992).

Congress identified the gross discrimination faced by minority groups and others in the Budget Act before mandating the use of the minority assistance process. Congress recognized that without minority assistance, the PCS auctions would exacerbate the economic discrimination faced by minorities. Congress, in an effort to level the playing field for minorities, directed the Commission to promulgate rules that would ensure that minority businesses were "not in any way excluded from the competitive bidding process."[22]

In light of the clear evidence of economic discrimination against minorities in the telecommunications industry, the government is able to demonstrate the requisite "gross statistical disparities" faced by minorities groups in the telecommunications industry, thus satisfying the first Adarand/Croson hurdle by demonstrating a compelling government interest.

2. The Commission's Minority Assistance Procedure Is Narrowly Tailored

The second prong of the Adarand test requires race-based assistance to be narrowly tailored to achieve a compelling interest. Here, the Commission's minority assistance program is narrowly tailored, as demonstrated below, because the program neither exceeds nor falls short of alleviating the well-documented economic discrimination suffered by minority-owned businesses.

In order to show that the minority assistance program is narrowly tailored, courts generally require the government to demonstrate that race-neutral means to alleviate the harm have been considered; however, that does not mean that the government must first exhaust race-neutral alternatives,[23] or use the "least restrictive means" available.[24] Further, the government

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[22] H.R. Rep. No. 111, 1993, U.S.C.A.A.N. at 255.

[23] See Coral Construction Company v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (noting that "[w]hile strict scrutiny requires serious,

(continued...)

may, in some circumstances, draw upon a previous consideration of race-neutral alternatives that it utilized prior to adopting its current race-based measure.[25]

In the instant case, the Commission considered and rejected race-neutral alternatives before promulgating its minority assistance program for the C block auction. In its Fifth Report and Order, the Commission stated that the "record clearly demonstrates" that the primary impediment to participation by minorities in the telecommunications industry is "lack of access to capital" caused by "lending discrimination," citing a congressional finding that concluded that women and minorities face particularly acute problems in raising business capital. Fifth Report and Order, at ¶¶ 10, 11 (citing the Small Business Act, §§ 112(4) and 331(a)(4)).

In an effort to help cure the economic discrimination faced by minority-owned businesses and the economic hardships faced by other designated entities, the Commission began a series of rule making proceedings where it considered numerous measures, including reserving all of the C and F block licenses for entrepreneurial businesses. But the Commission realized that reserving the entrepreneurs' blocks for just entrepreneurial companies "will not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain broadband PCS licenses." Id. at ¶ 13 (emphasis added). Thus, the Commission established a small business category within the entrepreneurs' block and made a ten percent bidding credit and installment payment plan available to small

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[23] (...continued)
good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative.").

[24] See Fullilove, 448 U.S. at 508 (Powell, J., concurring) (stating that the government is not required to limit remedial measures to the "least restrictive means of implementation.").

[25] See Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1009 n. 18 (3rd Cir. 1993).

businesses. The Commission also reduced the up-front payment required of all bidders eligible to bid in the C and F block auctions. In addition, it was clear to the Commission that simply instituting racially neutral alternatives with no race-based assistance would be insufficient to alleviate the economic discrimination suffered by minority groups and women.

In an effort to achieve its congressionally mandated goal of "ensur[ing] that businesses owned by members of minority groups and women are not in anyway excluded from the competitive bidding process,"[26] the Commission took five related steps within the entrepreneurs' blocks to assist minority groups and women in attracting the capital necessary to obtain a broadband PCS license. Id. at ¶ 13. Those five additional steps were (1) structuring its affiliation rules to permit large companies to make passive investments in designated entities; (2) making available 15 percent bidding credits for minorities and women; (3) making available to minorities and women installment payment plans that were more favorable than those available to others; (4) extending the tax certificate policies to minority and women-owned companies;[27] and (5) permitting individual members of minority groups investing in the control groups of minority-controlled bidders to exclude from their calculation of gross revenues and total assets the gross revenues and total assets of their affiliates. Id. at ¶¶ 14-18.

Each of the five elements of the minority assistance listed above was promulgated after the Commission considered and rejected the possibility that the reservation of the C and F blocks for entrepreneurs would be sufficient to address the economic discrimination suffered by minority-owned businesses. This rejection of a race-neutral remedy demonstrates that the race-

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[26] H.R. No. 103-111, 103rd Cong. 2d Sess. 255 (1993), reprinted in 1993 U.S.C.A.A.N. 378, 582.

[27] Supra note 12.

based assistance was were narrowly tailored.

It is also important to note that under the second prong of the Adarand test that the race-based measures must be just one factor in deciding whether minority members benefit from the government program.[28] Here, the minority assistance program guarantees nothing for minority applicants. The Commission has not set aside licenses for minorities, set quotas, or predetermined specific numerical goals for the auction. Minority applicants have no better chance of placing winning bids than non-minority applicants. The minority assistance program merely gives minority-owned companies faced with economic discrimination a fair opportunity to compete in the PCS auction process.

Another factor to be considered is the duration of the race-based assistance.[29] A particular measure should last only as long as it is needed. Here, the minority assistance program only applies during the entrepreneurs' block auctions; thus, the assistance is of an extremely limited duration.

Finally, courts review the degree of burden imposed on persons who do not belong to the groups that are favored by a racial or ethnic classification. The Supreme Court has said, however, that some burdens are acceptable, even when imposed upon persons who are not personally responsible for the discrimination suffered by the minorities.[30] In the instant case,

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[28] See Johnson v. Transportation Agency, 480 U.S. 616, 638 (1978) (approving a gender-based preference whereby "[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." (emphasis in original).

[29] See Croson, 488 U.S. at 510.

[30] See Wygant v. Jackson Bd. of Educ., 478 U.S. 267, 280-281 (1986), rehearing denied, 478 U.S. 1014 (1986) (noting that the Court has recognized that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of

(continued...)

there is little burden for non-minorities to bear, if any. Non-minority applicants will have the same opportunities to bid as non-minority applicants. No licenses will be set aside for minorities. The minority assistance that is available simply levels the financial playing field by attempting to alleviate the economic discrimination suffered by minority-owned businesses -- discrimination not faced by their non-minority competitors. Thus, the only "burden" that non-minority applicants will face is competing against minority-owned companies that have had a fairer chance of obtaining financing.

As demonstrated, the Commission's minority assistance program serves a compelling interest -- the alleviation of well-documented economic discrimination faced by minority-owned companies. The means of achieving this goal -- the minority assistance -- are narrowly tailored due to the fact that (1) the Commission has considered and rejected race-neutral measures; (2) the minority assistance program is are just a single factor at play in the entrepreneurs' blocks auction -- the minority assistance program alone in no way guarantee a minority applicant a license; (3) the minority assistance program is of a very limited duration; and (4) the burden, if any, imposed on non-minority applicants is negligible. The Commission's minority assistance process can therefore pass judicial scrutiny and should not be hastily discarded.

Currently, there is sufficient evidence in the record to support the Petitioner's conclusion that the Commission's minority assistance program would pass constitutional muster under Adarand. Thus, the C block auction should move forward under the rules promulgated prior to the adoption of the Sixth Report and Order. Nevertheless, in order to further ensure success in any lawsuits that may be filed appealing the minority assistance process, the Commission should

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30/ (...continued)
this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.").

conduct a further study regarding the severe lack of available capital for minority-owned businesses in the telecommunications arena.[31] Petitioners suggest that the Commission should initiate the study immediately so that results are available prior to any litigation. Courts have consistently held that an agency may rely upon after-acquired evidence to support findings of discrimination.[32] Therefore, the Commission should not delay the C block auction until the study is completed.[33]

The entrepreneurs' blocks auctions are the only hope left for minorities to have a meaningful opportunity to participate in PCS. The Commission must vacate its Sixth Report and Order in order to help minority-owned businesses -- businesses that suffer from well-documented economic discrimination -- compete with their non-minority counterparts.

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[31] Under Section 309(j) of the Communications Act, the Commission is permitted to use money raised from the auctions to fund the study. Communications Act, § 309(j)(12)(D)(iv).

[32] See e.g, Coral Constrc. Co. v. King County, 941 F.2d 910, 920 (2d Cir. 1991), cert. denied, 112 S.Ct. 875 (1992) (stating that the "law is plain that the constitutional sufficiency of...proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment.").

[33] Furthermore, the study could also be used to help support the minority assistance for the upcoming F block auction.

III. CONCLUSION

WHEREFORE, the premises considered, the undersigned respectfully request the Commission to vacate its Sixth Report and Order and proceed with the C block auction under its rules promulgated in its Fifth Report and Order and Fifth MO&O.

Respectfully submitted,

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INTEGRATED VOICESYS. INC
OPPORTUNITIES NOW ENTERPRISES, INC.
ONDAS COMMUNICATIONS SERVICES, INC.
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