Street Journal reported that experts estimate that less than 1% of the $3 Billion invested by institutional venture capitalists in 1993 was invested in women-owned companies.[31] In addition, the scarcity of female partners in traditional venture capital funds has been cited as a reason that women-owned businesses have been unable to access venture capital funds.[32] Testimony by venture capitalists before the NWBC indicates that perceptions and stereotypes of women contribute to the lack of venture funding committed to women-owned businesses. Venture capitalist experts told the NWBC:

> women-owned businesses, even those seeking capital at the level which might interest venture capital sources, rarely fit the profile of the few ventures funded each year.[33]

There also is a void of financial firms targeting investments in women-owned communications companies. Several SSBIC's target funding of minority communications companies. AWRT and WOW are unaware of any such firms for women-owned communications companies.

B. The Market Entry Barriers Women Face In Access to Capital Exists at All Sizes of Women-Owned Firms

Women-owned firms that succeed in the start-up phase of operations continue to face barriers to accessing capital. Accordingly, the market entry barriers for women are not dependent on size. At the NWBC's hearing on the opportunity for women in telecommunications testimony confirmed the continued barrier to growth faced by successful women entrepreneurs:

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[31] Venture Capitalists Target Women Owned Businesses, New Funds See Opportunities for Investment in a Market Long Neglected, *The Wall Street Journal*, Jan. 6. 1994.

[32] *Id.*

[33] NWBC 1992 Report at 8.

> Women in both high technology industries and telecommunications who actually had found funding in the $6 to $18 million range told of difficulties which seemed far beyond what should be expected for companies with records of successful and profitable operation. At this top level of small business as well as the start-up level, women do no fit traditional, comfortable profiles and compete less successfully for scarce expansion dollars.[34]

Many women often find themselves in a financing Catch-22 as they grow beyond the size qualifications of loan programs of the Small Business Administration and continue to need capital that is in scarce supply.

C. The Collateral Crisis

The profile of a women-owned communications company also poses a challenge to lenders who seek to secure their loans with tangible assets as collateral. Women, more than men, confront difficulties in providing collateral to secure a business loan. The NFWBO found that close to one quarter of the women they surveyed cited the lack of collateral as their biggest financial barrier. This is especially true for women in communications businesses licensed by the FCC. Women-owners seeking financing to purchase spectrum licenses repeatedly cited to AWRT the inability to use the FCC license as collateral as a funding obstacle. In addition women providing content to station licensees, such as radio programs, found their funding efforts constrained by the lack of collateral in "air time".

This lack of collateral is compounded according to women entrepreneurs interviewed by AWRT by the perceived "risk" in dealing with a company controlled by women. One woman with a strong track record in telecommunications management and ownership reports confronting repeated skepticism about her dedication to her business based on her gender and pregnancy. An

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[34] NWBC 1992 Report at 8.

AWRT member seeking to finance the acquisition of a radio station confronted skepticism that a woman could win a radio station license. Not surprisingly, the NFWBO found that many women reported that financial institutions view them as a greater credit risk "merely by virtue of their gender".[35]

This skepticism about the stability and creditworthiness of women-owned companies is contradicted by the credit track record of women-owned companies. The NFWBO has documented that women-owned businesses do not pose a greater financial risk than other U.S. firms. Specifically, based on a statistical model developed by Dun & Bradstreet to provide a Financial Stress Score, women-owned businesses were found to pose no greater risk of closing their doors than the average U.S. business.[36] In addition, women-owned firms had payment records very similar to the average U.S. business.[37] The perceived risk is based on overly broad and unfounded stereotypes of women refuted by the performance of women-owned companies.

VI. Discrimination Against Women in Education and Perpetuation Of the Glass Ceiling Has Restricted Ownership Opportunities for Women

In its Report to the President that included its analysis of women entrepreneurs in telecommunications, the NWBC noted:

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[35] Breaking the Boundaries at 13.

[36] *Id.*

[37] *Id.* at 14.

there is a marked lack of women with the technical and managerial expertise--plus the length of experience--to start successful telecommunications businesses.[38]

The NFWBO reports that the third most common complaint women business owners cite in securing bank financing is the "limited track record" of women business owners.[39] This lack of technical and managerial experience is traceable to prior discrimination against women in education and continued barriers to promotion to senior positions in corporate governance.

A. Discrimination Against Women In Education Restricts Opportunities

Prior to the enactment of Title IX of the Education Amendments of 1972, sex discrimination was permitted and practiced in federally funded education. As a result, until 1972, the educational opportunities for women were limited. For example, Princeton and Yale did not accept women until 1969. The University of Virginia did not accept women until 1970.[40] Harvard Business School excluded women until 1963.[41]

Discrimination against women in education has lingering adverse consequences that have limited women's opportunities including those in the communications industry. Specifically, this

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[38] NWBC 1992 Report at 15. The Department of Justice cited minority companies' ability to secure the "twin building blocks" of experience and financing as critical to their success in government contracting. The Department of Justice's preliminary survey of the evidence revealed discriminatory barriers in securing each of the necessary building blocks. DOJ Procurement Reform, 61 Fed. Reg. at 26054.

[39] Financing the Business at 5.

[40] National Women's Law Center, *Discrimination Against Women in Education: Why Affirmative Action For Women in Education Remains Essential* (Sept. 1995) ("NWLC Education Bulletin") at 1. A copy of the NWLC Education Bulletin is attached as Exhibit 4.

[41] *Id.*

sex-based discrimination has artificially limited the opportunities for women to acquire degrees in engineering and technical sciences. The National Women's Law Center reports that until 1972, there was a 10% ceiling on women students in most engineering programs.[42] The National Women's Law Center also reported in September 1995, that women remain excluded from or under-represented in key nontraditional areas of study, such as engineering and mathematics although women now represent over 53% of the undergraduates. [43]

An article in the August, 1996 issue of the Institute of Electrical and Electronics Engineers, Inc.'s publication, IEEE Spectrum, described the current state of advancement by women in engineering in the U.S.

> The glass ceiling is still very much a fact of life in high-technology firms, as a look at the faces of the top management in such companies quickly confirms. It is true that the pool of technically trained women to bring into the top ranks of management is small. **In the United States, less than one in ten engineers is a woman**. Worldwide the number is even smaller. Even so, far less than 10 percent of the chief executive officers and chief technical officers in high-tech U.S. firms are women.
>
> To become an engineer or a scientist in the first place, a woman needs more than brains and interest. She also needs the active encouragement of teachers and the support of family members to counteract the pervasive impression that women are simply not good at math and science.
>
> But once through school and into an industrial environment, many women engineers report that technical competence and congeniality alone are inadequate for survival, let alone success. In fact, vigilance, bulldog determination, and fierce independence are

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[42] National Women's Law Center, *Two Hundred Years of Continuing Discrimination: Why We Need Affirmative Action for Women* (May 1995) at 3. A copy of this publication is attached as Exhibit 5.

[43] NWLC Education Bulletin at 2.

> necessary defenses against the subliminal messages of inferiority, indifference, and isolation that are often sent from colleagues and managers. (emphasis added)[44]

The stereotypes women continue to combat in technical occupations has limited the number of women in engineering and contributed to the skepticism of the business and technical acumen of women to operate communications companies.

B. The Glass Ceiling Continues to Block Women's Advancement in Management

The Glass Ceiling that prevents women from reaching the upper echelons of corporate management in high-tech companies and other companies has limited the track record and management experience that women can bring to communications company ownership. In its report last year on minority entrepreneurs in telecommunications, NTIA identified management experience as a key factor in accessing venture capital.[45] The Federal Glass Ceiling Commission has documented that women have not made significant progress into the highest levels of corporate management. The Federal Glass Ceiling Commission found:

> [a]t the highest level of business, there is indeed a barrier only rarely penetrated by women or persons of color.[46]

Another stunning finding of the Glass Ceiling Commission was that "in the private sector, equally qualified and similarly situated citizens are being denied equal access to advancement on the basis of gender, race or ethnicity."[47] The report found not only few women and minorities in

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[44] *Entrepreneurial Women Engineers*, IEEE Spectrum, August, 1996 at 28.

[45] NTIA Capital Report at 16.

[46] The Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital,* Washington, D.C. (March, 1995) ("Glass Ceiling Report") at iii.

[47] *Id.* at 10-11.

the highest level positions but also that "relatively few women and minorities are in the position most likely to lead to the top -- the pipeline."[48] These findings are significant when combined with the fact that the NWBC cited the marked lack of women with the technical and managerial expertise -- plus length of experience -- to start a successful telecommunications business as one of the primary impediments to women's entry into the telecommunications industry.[49]

In its fact finding report, the Federal Glass Ceiling Commission found that women in corporate America believe there has been some movement through the glass ceiling but there is still a long way to go.[50] Ninety-three percent of the senior executive women surveyed felt that a glass ceiling for women still exists.[51] Ninety-five to ninety-seven percent of senior managers are men.[52] Far less than 10% of the chief executive officers and chief technical officer in high-tech U.S. firms are women.[53] At the corporate board level women remain scarce. Fewer than 10% of the largest employer have women on their board of directors.[54] As managers, women represented 25.5% of the managers in transportation, communication and public utility firms.[55]

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[48] *Id.* at iv.

[49] NWBC 1992 Report at 15.

[50] Glass Ceiling Report at 10.

[51] *Id.* at 148.

[52] *Id.* at 12.

[53] IEEE Spectrum at 28.

[54] Glass Ceiling Report at 12. Women are making strides in board membership. From 1993 to 1994 the number of women on Fortune 1000 boards increased 13%. *Id.* at 144.

[55] *Id.* at 17.

In response to their inability to penetrate the glass ceiling many women are turning to business ownership as an alternative to the barriers that continue to exist in corporate management.[56] Accordingly, a byproduct of the barriers faced by women in rising through the corporate ranks is increased growth in women-owned businesses. Federal policies that promote such ownership provide a valuable and increasingly effective means of redressing the discrimination faced by women in employment.

C. The FCC's EEO Policies Have Increased Female Participation in the Communications Industry

With the extension of its equal employment opportunity policies for mass media companies to women, women began to make gains in employment at radio and television stations. The Commission's policies more than any other factor, forced stations to challenge their stereotypes of women especially regarding their ability to report news. In her testimony before the Federal Glass Ceiling Commission, former network anchorwoman Connie Chung recalled a remark made by the then President of NBC News to her in 1971. According to Ms. Chung the network president said "he didn't think a woman's voice was acceptable on the news".[57] Ms. Chung continued to testify that the network news president subsequently hired her in 1983, more than a decade after the FCC's EEO policies were in place, to anchor the news at NBC. The changed view was no doubt attributable, in part, to the FCC's push for more extensive recruitment of women and minorities by broadcast stations through its EEO rules, the subsequent

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[56] IEEE Spectrum at 28.

[57] Glass Ceiling Commission Hearing, September 26, 1994, Transcript at 42.

hiring of more women to broadcast the news and public acceptance of women in this role. As noted by the New York Times in 1983:

> the number of women on camera in television news has increased considerably over the last decade, from virtual invisibility to wide-spread acceptance. This gain has been accomplished in part because of an order by the Federal Communication Commission in 1971 requiring local stations to begin affirmative-action programs.[58]

Prominent news women today, including station operations managers and on air personalties, attribute their break into the business to the FCC's EEO rules. One AWRT member credits the FCC's EEO rules and pressure by women's group with causing a major market television affiliate to enter into a citizens settlement agreement calling for women to hold sales and management positions given their absence from these positions.

Despite these gains in on-air visibility for women, the Federal Glass Ceiling Commission recently noted the limited diversity in television and newspaper newsrooms:

> Efforts to diversify television and newspaper newsrooms with minorities and women has yielded limited progress according to several recent surveys by the American Society of Newspaper Editors, the Radio and Television News Directors Foundation and Vernon Stone at the Missouri School of Journalism. Progress toward promoting minorities and women into decisionmaking positions was even less evident. The Commission recommends the industry recognize the urgency of getting women and minorities into decisionmaking positions, especially in television, and notes that the lack of minority and women ownership in media outlets has a long-term negative impact on news reporting.[59]

VII. Women-Owned Businesses are Rarely Granted Federal Procurement Contracts and Achieve On Average of Less than 10% of Procurement Contracts From Leading Telecommunications Companies In California

A. Women Have Been Denied Equal Access to Federal Procurement Contracts

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[58] N.Y. Times, Aug. 6, 1983 at 44.

[59] *A Solid Investment: Making Full Use of the Nation's Human Capital, Recommendations of the Federal Glass Ceiling Commission,* November, 1995 at 47.

In a report released last year, the Interagency Committee on Women's Business Enterprise identified opening up the federal procurement market to women as an important goal. The Committee recognized the wide divergence in the number of women-owned companies and the small portion of federal procurement contracts awarded to small women-owned businesses:

> Despite the fact that one-third of all businesses are owned by women, they have historically received only a minute share of the federal procurement dollar. That needs to greatly improve -- to ensure not only that women-owned businesses have an equal opportunity to participate, but that the nation as a whole benefits from having a broader base of qualified, competitive contractors.[60]

In 1994, small women-owned businesses received 2.8% of all federal procurement dollars. Significantly, this level of contracting represented a 27% increase from 1992. In 1992, small women-owned businesses received 2.2%. In recognition of the low level of contracting by the Federal government with small women-owned companies, Congress enacted the Federal Acquisition Streamlining Act in 1994. This legislation challenges each agency in the federal government to buy at least 5% of its goods and services from women-owned small businesses.[61]

Significantly, studies have shown that companies that have federal contracts and are subject to federal oversight have greater employment rates for women. Studies also shows that women made greater gains in employment at companies doing business with the federal government than at other companies. Female employment rose 15.2% at federal contractors and

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[60] Interagency Committee Report at 11.

[61] 15 U.S.C. § 644(g). The statutory provision provides: "The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year."

only 2.2% elsewhere.[62] Federal contractors also employed women at higher levels and in better paying jobs than at other firms.[63]

B. Procurement by Telecommunications Companies in California From Women-Owned Businesses Does Not Parallel the Large Number of Women-Owned Firms

Data on procurement of goods and services by telecommunications companies[64] in California reveals that contracting with women-owned companies is on average over 200% below the number of women-owned firms. California telecommunications companies regulated by the California Public Utilities Commission ("CPUC") are required by California law and the CPUC to file annual reports with the CPUC documenting their procurement from women and minority owned enterprises. The CPUC, in turn, submits an annual report to the State legislature analyzing the procurement data. The reporting requirement which was adopted by the CPUC in 1988 pursuant to California law[65] establishes a long term procurement goal for regulated utilities of purchasing not less than 15% of their procurement from minority-owned business and 5% from women business enterprises. Procurement is calculated as a percentage of total procurement and is not limited to purchases from other communications firms. Significantly, as reported by the U.S. Census in both 1987 and 1992, California had the highest number of women-owned businesses.

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[62] Citizen's Commission on Civil Rights, *Affirmative Action To Open Doors of Job Opportunity*, 123-129 (1984).

[63] *Id.*

[64] Total procurement includes all purchases and is not limited to purchases of communications services from women-owned firms.

[65] Ca. Pub. Util. Code §§ 8281-8285.

AWRT and WOW have analyzed the annual reports submitted by the CPUC to the State legislature from 1986 to 1993 and the summary data in those reports submitted for AT&T, MCI, U.S. Sprint, GTE, Pacific Bell and Roseville Telephone Company. While the data reveal that these companies generally met the recommended procurement goal for women of 5%, procurement by these companies did not begin to approach a level representative of the number of women-owned firms. On average, over the years for which data was reported the analyzed telecommunications companies purchased 6.7% of their procurement from non-minority women-owned companies and 2.8% from minority women-owned companies. Significantly, Pacific Bell, the local exchange carrier and telecommunications company with the largest level of

procurement in California, ranked second to last in its purchases from women-owned companies.

Procurement by Certain California Telecommunications Utilities from Women-Owned Firms

Company	Data Years	Average Procurement from Non-Minority Women-Owned Firms[66]	Average Procurement from Minority Women-Owned Firms
AT&T	1986-1993	6.9%	4.0%
GTE	1986-1993	10.0%	1.96%
Pacific Bell	1986-1993	5.6%	2.47%
MCI	1987-1992	4.9%	N/A
Roseville Telephone	1987, 1989-1992	6.8%	N/A
Sprint	1987-1992	5.9%	N/A
Overall Average	**1987-1992**	**6.7%**	**2.8%**

This data indicates the women-owned businesses although growing in strength and number to 34% of all U.S. firms do not have a significant level of contracting opportunities with telecommunications companies. The data further confirm the minimal inroads that women have made in entering the communications industry as suppliers and partners with telecommunications companies.

[66] The reports include separate data for non-minority and minority women-owned firms.

VIII. Gender-Based Policies Should Be Adopted by the Commission to Serve the Important and Compelling Government Interest in Redressing Discrimination Against Women

As recognized in the NOI, gender-based measures adopted by the Commission will be subjected by courts to intermediate scrutiny not strict scrutiny.[67] The level of review for gender-conscious policies in unchanged by the U.S. Supreme Court's decision in *United States vs. Virginia*, invalidating the single sex admission policy of Virginia Military Institute ("VMI"), and the Supreme Court's earlier decision in *Adarand*.

A. Gender-Based Programs Are Subject to Intermediate Scrutiny

The U.S. Supreme Court and lower courts consistently have applied a level of scrutiny referred to as intermediate scrutiny to gender-based government policies. This level of scrutiny is less rigorous than the standard of strict scrutiny applied to race-based programs in *Adarand*. In its latest decision on gender-based programs, the Supreme Court had the opportunity and chose not to change the level of scrutiny of gender-based programs involving government actions. The Court's election not to change the standard of review for programs based on gender was explicit: "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin."[68]

In striking down VMI's single sex policy the Court reiterated the standard test for reviewing gender-based programs previously applied by the Supreme Court in *Mississippi Univ.*

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[67] NOI at ¶ 44.

[68] *United States v. Virginia*, 64 U.S.L.W. at 4643.

for Women v. Hogan.[69] As articulated by the Court in *U.S. v. Virginia*, for a court to sustain a gender-based program it must be supported by an exceedingly persuasive justification provided by the government.[70] An exceedingly persuasive justification will be found if the government demonstrates its gender-based policies satisfy two criteria:

> (1) the classification serves important governmental objectives; and
> (2) the discriminatory means employed are substantially related to the achievement of those objectives.[71]

Compensatory programs for women were recognized by the Court as permissible government objectives in *United States v. Virginia:*

> Sex classifications may be used to compensate women 'for particular economic disabilities they have suffered', *Califano v. Webster, 430 U.S. 313,320 (1977) (per curiam),* 'to promote equal employment opportunity', see *California Federal Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), and to advance full development of the talent and capacities of our Nation's people.[72]

Gender-based classifications may not be used, however, to create or perpetuate legal, social and economic inferiority of women.

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[69] 458 U.S. 718 (1982).

[70] The exceedingly persuasive justification language included in the majority opinion to describe the intermediate scrutiny test is not novel or a change in the standard of review as suggested by Justice Rehnquist in his concurring opinion. This language is merely a means to articulate the traditional standard of intermediate scrutiny. Even if the inclusion of language did change the standard, the standard for review of gender-based programs would remain less rigorous than the review applied in strict scrutiny.

[71] *United States. v. Virginia*, 64 U.S.L.W. at 4643.

[72] *Id.*

B. Important and Compelling Government Interests Exist in Eradicating Sex Discrimination and its Lingering Effects

As the Court's opinion in *United States v. Virginia*, made clear, the Court's decision in *Adarand* does not bar or change the intermediate level of review a court would apply to policies adopted by the FCC to promote female ownership of communications companies and eliminate market-entry barriers for women-owned businesses. Furthermore, even if strict scrutiny were to apply to any gender-based programs adopted by the Commission such policies could be narrowly tailored to serve the compelling government interest of eradicating the lingering effects of gender discrimination and to achieve Congress' goal of widely disseminating spectrum licenses[73] and fostering a diversity of media voices.[74] The Supreme Court's holding in *Adarand* should not be interpreted by the Commission as the death knell for polices to promote diversity in communications company ownership. As Justice O'Connor noted in her opinion for the Court, strict scrutiny is not strict in theory, but fatal in fact.[75]

A compelling interest exists in remedying gender discrimination in the public sector and by government practices that sustain or subsidize gender discrimination by private actors. As the Department of Justice stated in its proposal for reform of affirmative action in federal procurement:

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[73] 47 U.S.C. § 309(j).

[74] 47 U.S.C. § 257.

[75] *Adarand, 115 S. Ct. 2097.*

- Congress has a compelling interest in exercising its constitutional power to remedy the impact of private discrimination on the ability of minority business to compete in contracting markets

- Congress has a compelling interest in exercising its constitutional power to redress the statistical disparities reflected in the studies that give rise to an inference of discrimination by state and local governments, or at a minimum suggest that those governments are compounding the impact of private discrimination through ostensibly neutral procurement practices that perpetuate barriers to minority contracting opportunities.

- Congress has a compelling interest in ensuring that expenditures by the federal government do not inadvertently subsidize the discrimination by private and public actors . . . . Were that to occur, the federal government would itself become a participant in that discrimination through procurement practices that serve to sustain impediments to minority opportunity in national contracting markets. [76]

Similar compelling interests, and certainly important government objectives, exist in eradicating market entry barriers that exist for women in entering the communications industry. These policies are supported as remedial measures to redress discrimination against women and as non-remedial measure to achieve Congress' goal of diversity in spectrum assignment and media voices. Such interests are strengthened by the Commission's role in allocating the government resources of the radio frequency spectrum, similar to the allocation of federal procurement dollars, and in its regulation of a vast majority of communications companies in the United States.

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[76] DOJ Procurement Reform, 61 Fed. Reg. at 26062-63.

C. Important Government Objectives and Compelling Government Interests Exist that Provide an Exceedingly Persuasive Justification for Adopting Gender-Based Policies to Eradicate Market Entry Barriers Faced By Women-Owned Communications Firms

The communications industry has been identified as a key growth area for entrepreneurs and for women by NTIA and the Federal Glass Ceiling Commission. Women are ready to seize the opportunities for ownership in the industry if they can surmount the discriminatory barriers that have restrained their ability to access capital, receive engineering degrees, and restricted their employment and advancement. Commission policies that promote female ownership support the exceedingly persuasive justification of remedying discrimination against women.

(1) Discrimination in Lending

The Supreme Court in *United States v. Virginia*, found that sex-based policies may be used to compensate women for particular economic disabilities they have suffered. Women-owned businesses, as demonstrated above, face economic disabilities in their ability to raise capital. These barriers do not appear to be faced by non-minority men. The severity of the economic disability for women is magnified in the communications industry which is capital intensive. The economic disability faced by women spans the range of financing alternatives:

- One-third of women-business owners perceive some degree of gender-based discrimination by loan officers. Twenty percent report that their loan officer insisted upon their spouse's signature in order to obtain a loan. Fourteen percent of the surveyed women-business owners believe that the mere fact that their business was women-owned was an impediment to obtaining financing.

- In 1993, as reported by T*he Wall Street Journal*, less than 1% of the $3 Billion invested by institutional venture capitalists was received by women-owned businesses.
- With the elimination of government incentives to partner with women entrepreneurs for broadband PCS licenses, equity investors have terminated their investment plans.

Additional case law supports the conclusion that promising economic opportunity for women is an proper government interest. According to the U.S. Supreme Court "[r]eduction in the disparity in economic condition against women has been recognized and such an important government objective." *Califano v. Webster*, 430 U.S. 313, 317 (1977). *See also, Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (remedying disadvantages women face in the market place is an important government interest); *Coral Construction Co. v. King County*, 921 F.2d 910, 932 (9th Cir. 1991) (The county "has a legitimate and important interest in remedying the many disadvantages that confront women business owners").

(2) Discrimination in Employment

Sex-discrimination continues to exist in employment as determined by the bi-partisan Federal Glass Ceiling Commission. Other studies confirm the continued presence of sex discrimination in employment. One study, cited by the Department of Justice in its review of evidence on discrimination against minorities concluded, "more than three years after the passage of the Civil Rights Act, segregation by race and sex continues to be the rule rather than the exception in the American workplace, and discrimination still reduces the pay and prospects of workers who are not white or male."[77] Discrimination against women in employment, especially at the higher levels of corporate leadership, has limited the "track record" and contacts women can bring to communications ownership. The Supreme Court recognized in *United States v.*

[77] DOJ Procurement Reform, 61 Fed. Reg. 26056.

Virginia, that gender-based policies can foster the important government interest of promoting equal employment opportunity.

(3) Discrimination in Education

Until 1972, sex-discrimination was permitted in federally supported education. This government authorized discrimination severely limited the educational opportunities for women. Prior to 1970, most engineering programs had a 10% ceiling on the admission of female students. Today, women still suffer the effects of this discrimination in education. Less than 1 of 10 engineers in the U.S. is a woman. Successful engineers routinely attribute their decision to enter engineering to a positive role model who countered the message that continues to be given to women that they are not good in math and science. While progress may be made in these areas, the remnants of this discrimination continue to inhibit women from developing the "track record" in engineering that remains important to communications ownership.

(4) Congressional Findings of Discrimination

Congress has repeatedly noted the discrimination women face in lending and in the communications industry. In 1988, Congress enacted the Women's Business Ownership Act which found in part:

- despite progress by women-owned businesses, women, as a group, are subject to discrimination in entrepreneurial endeavors due to their gender;
- such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities

In the House Report on the 1992 Cable Act, the Energy and Commerce Committee noted:

> The Courts and the Commission have consistently recognized that the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper level positions with media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities. . . The Committee notes that women and minorities are still significantly under-represented as employees and owners in the industry.[78]

The Federal Glass Ceiling Commission also recognized the low level of women and minorities in decisionmaking positions in the mass media industry.

D. Non-Remedial Interests

Gender-specific policies also are appropriate to address the non-remedial goals of diversity in the communications industry established by Congress as important government objectives. In Section 257 and Section 309(j) of the Communications Act, Congress recognized several non-remedial interests that provide an exceeding persuasive justification for Commission policies that provide incentives for female-ownership of communications companies. First, in Section 257, Congress directed the FCC to eliminate market entry barriers to "promote the policies and purposes of this Act **favoring diversity of media voices**, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity." Incentives to foster female ownership of broadcast stations will promote a diversity of media voices. The D.C. Circuit's decision in *Lamprecht v. FCC* does not prohibit the adoption of policies to promote female ownership of mass media facilities provided that a nexus between

[78] H.R. Report No. 102-628, 102d Cong., 2d Sess., at 144 (1992).

ownership and viewpoint diversity can be established. The decision by the court in *Lamprecht* requires that the Commission develop a strong record demonstrating that female ownership promotes viewpoint diversity.[79]

Evidence demonstrating the differing choices that women make on issues and in viewpoint was provided to the Commission in comments filed in MM Dockets No. 94-149, 94-140 on May 17, 1995 by the Citizens Communications Center Project. The research and analysis presented by the Citizens Communications Center Project demonstrate that a nexus does exist between female ownership and viewpoint diversity.

Statistics from AWRT's annual commendation awards also demonstrate the differing programming viewpoints of women in management roles. Every year AWRT issues a series of commendation awards. The awards recognize individuals in radio, television, and cable entertainment programs, commercials, news features and other programs who encourage the positive and realistic portrayal of women in radio and television. In 1996, 80% of the award winners had a women executive producer or producer. One decade ago, in 1986, an analysis of local radio and television station entries found that for radio entries, women represented 84.2% of the writers, 58.5% of the producers and 92.9% of the reporter/hosts.

The Omnibus Budget Reconciliation Act of 1993, which granted the Commission the authority to award spectrum licenses through competitive bidding, also contains a Congressional directive to the Commission on the importance of ensuring a wide dissemination of licenses and

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[79] The Supreme Court's decision in *Adarand* did not invalidate the finding in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), that a nexus exists between programming and minority ownership. The Court's decision merely changed the standard of review that applies to the Commission's minority ownership policies.

to develop rules and provisions that ensure small businesses as well as businesses owned by minorities and women, and rural telephone companies have an opportunity to participate in the growing wireless industry. Significantly, as the auction data set forth in Section II indicates, women-owned businesses are severely limited in their ability to acquire spectrum licenses in the absence of incentives, such as bidding credits and installment plans, targeted to women.

IX. Recommendations

AWRT and WOW propose the following policies as a starting point for eliminating market entry barriers faced by women-owned businesses seeking to enter the communications industry:

1. broadcast spectrum (digital or analog) be licensed through a process other than comparative hearings;

2. an incubator or mentor/protege program be established to encourage existing industry companies to partner and support women-owned companies;[80]

3. stringent enforcement of the FCC's equal employment opportunity rules (even if streamlined) to ensure women are permitted non-discriminatory access to senior management;

4. additional financing incentives for women-owned businesses bidding for spectrum in competitive bidding (i.e. bidding credits, installment plans, etc.);[81]

5. relaxed attribution thresholds for ownership in women-owned spectrum licensees by:

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[80] The Air Force adopted a mentor-protege program in 1992 to encourage large prime contractors to subcontract with women-owned minority firms and other socially disadvantaged businesses. A mentor-protege program also has been established by the Department of Energy and NASA. The Department of Justice recommended continued (but slightly modified) use of this program in the post-*Adarand* environment.

[81] The Department of Justice proposes to continue the use of credits for prospective federal contractors that subcontract with minority-owned companies. DOJ Procurement Reform 6 Fed. Reg. at 26046.

A. increasing the aggregate amount of spectrum (*i.e.* spectrum cap) that one entity may hold if it invests in a women-owned spectrum licensee;

B. permitting radio station holdings in excess of the local ownership limits contained in the Telecommunications Act of 1996 if some of the holdings are in women-owned businesses or the station owner adopts an incubator program for women-owned stations;

C. permitting television holdings that exceed the national audience reach limitation of 35% contained in the Telecommunications Act of 1996 if the additional reach is attributable to women-owned companies or the station owner adopts an incubator program for women-owned stations; and

6. completion of appointment of the members of the Telecommunications Development Fund. The Telecommunications Development Fund, established by Congress in the Telecommunications Act of 1996, will be an important informational and financial resource for small women-owned businesses.

In addition, AWRT and WOW urge the Commission to augment its record on female ownership of communications companies by:

1. collecting gender and race data on existing licensees by amending it annual ownership report and requiring a one time submission of immediate data (this will assist in monitoring the continued need for any policies adopted by the Commission);

2. continuing to collect information of female and minority ownership of bidders that participate in spectrum auctions for new services;

3. conducting an analysis of women-owned companies participation in the auctions, including an analysis of the number of applicants, amount of upfront payments, bidding activity on a round-by-round basis, number of licensees, amount of downpayments and markets won.

4. requesting more specific data from the Census Bureau on women-owned communications companies (i.e. 1992 data to the four level SIC code rather that the two level SIC code); and

5. conduct an academically rigorous study of female ownership of communications companies as outlined in Section IV.

AWRT and WOW look forward to working with the Commission as it proceeds to eradicate market entry barriers faced by small businesses and the additional barriers faced by women.

Respectfully submitted,
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