

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
CHAMELEON RADIO CORPORATION)
)
Order to Show Cause Why the License)
of Station KFCC(AM), Bay City, Texas)
Should Not Be Revoked)
)
Request for Extension of Special)
Temporary Authority)
)
Request for Extraordinary Relief)

MM Docket No. 96-173

To: The Commission

PETITION FOR RECONSIDERATION

Thomas A. Hart, Jr.
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To: The Commission

PETITION FOR RECONSIDERATION

I. SUMMARY

1. Chameleon Radio Corporation (“Chameleon”) and Bernard Smoots (“Smoots”), through counsel and pursuant to Section 1.106 of the Commission’s Rules, hereby seek reconsideration of the Commission’s Decision revoking Chameleon’s license for radio station KFCC(AM), Bay City, Texas.¹ Specifically, Chameleon and Smoots urge the Commission to reconsider the severity of the punishment imposed in the Decision in light of the unique

1. *Chameleon Radio Corp.*, Decision, FCC 98-73 (released Apr. 22, 1998) (hereinafter “*Decision*”). This Petition is timely filed pursuant to Section 1.106(f) of the Commission’s Rules.

circumstances of this case and allow Chameleon to assign its station license to Smoots pursuant to the Commission's distress sale policy.

2. Revoking Chameleon's license would not only penalize Chameleon, but also the Bay City community. KFCC(AM) is Bay City's only AM station, and if the Commission revokes Chameleon's license, the station would remain dark for an extended period of time until the Commission could conduct an auction for the license. Based on the Commission's current freeze on applications for new radio stations, this would probably take months, if not years. Clearly, this is not in the public interest. Furthermore, the loss of KFCC(AM) would mean the loss of numerous jobs currently held by innocent people and the elimination of the only broadcast outlet for nearly two dozen programmers that offer multilingual programming from such diverse cultures as India, Russia, El Salvador and Peru. In the current trend toward media concentration, this is one station that offers a unique format and is a stand-alone operation.

3. Alternatively, the Commission could benefit the public interest by allowing Chameleon to assign the station to Smoots, an African American, pursuant to the Commission's distress sale policy. This would keep the station on the air, preserve the station's unique format, and increase (rather than decrease) employment, while simultaneously increasing minority ownership of broadcast stations. Furthermore, Chameleon would be severely punished by being put out of business and receiving only a fraction of the station's fair market value.

II. BACKGROUND

4. Chameleon is licensee of KFCC(AM), a multi-ethnic language station serving the diverse cultures living in the Houston, Texas market. On April 21, 1995, Chameleon filed a request

for Special Temporary Authority (“STA”) to operate KFCC(AM) from an alternate site.² On May 5, 1995, the Commission granted the STA.³ After granting the STA, the Commission sent a letter to Chameleon asking it to explain the circumstances surrounding its need for an STA.⁴ Unsatisfied with Chameleon’s response, the Commission canceled the STA on September 8, 1995.⁵ Chameleon again tried to respond to the Commission’s questions regarding Chameleon’s STA request; however, the Administrative Law Judge (“ALJ”) who presided over this case did not believe Chameleon’s explanation.⁶ Based on its findings, the ALJ concluded that Chameleon was unqualified to be a Commission licensee.⁷ Chameleon filed Exceptions to the ALJ’s findings, and, on April 22, 1998, the Commission affirmed the ALJ’s findings and ordered that Chameleon’s license be revoked.⁸

5. Chameleon in no way concedes to the ALJ’s finding, but does not challenge it herein. Rather, Chameleon urges the Commission to reconsider the severity of the punishment imposed. Since the Commission issued the Decision, Mr. Smoots, an African American, has entered into a Letter of Intent to purchase the station pursuant to the Commission’s distress sale policy.⁹ As such, the Commission could obtain the same objective -- removing Chameleon’s authority to broadcast

2. *See Decision* at paras. 3-5.

3. *Id.* at para. 5.

4. *Id.*

5. *Id.* at paras. 5-6.

6. *Id.* at para. 6.

7. *Id.* at paras. 14-15.

8. *Id.* at paras. 16, 24-25.

9. *See Letter of Intent to Purchase*, dated May 18, 1998, attached as Exhibit 1 hereto.

from station KFCC(AM) -- while maintaining diverse programming in Bay City and increasing minority ownership.

III. THE COMMISSION'S PENALTY IS TOO SEVERE AND DAMAGES THE PUBLIC INTEREST.

6. The Commission had at its disposal various methods of sanctioning Chameleon. For example, the Commission could have imposed a forfeiture or financial penalty on the licensee as it does in most cases.¹⁰ Additionally, the Commission could have allowed Chameleon to transfer control of the license or to place the license in trust until the Commission could approve an assignee for the license. By revoking Chameleon's license -- the ultimate sanction -- the Commission is unfairly penalizing this broadcaster, at the public's expense.

7. Imposing a less extreme penalty is in line with Commission precedent. For example, in *PCS 2000, L.P.*, the Commission chose to fine an applicant, rather than revoke its pending applications, for its principal's intentional misrepresentation of facts and lack of candor to the Commission.¹¹ The Commission in that case concluded that, because the applicant removed the principal from all positions held within the applicant and eliminated the principal's ownership interests, a fine was the appropriate penalty.¹²

8. By analogy, rather than immediately revoking Chameleon's license, the Commission should have fined Chameleon. If a fine was not sufficient punishment, then the Commission should have either ordered Chameleon to transfer control of the license and remove Chameleon's principal

10. See, e.g., *Metro Program Network, Inc.*, 67 RR2d 1254 (1990); *Dial-A-Page, Inc.*, 72 RR2d 1122 (1993); *Centel Cellular Co. of North Carolina*, 4 CR 676 (1996).

11. *PCS 2000, L.P.*, 6 CR 237 (1997).

12. *Id.* at 242.

officer from all management responsibilities, or placed the station in trust until an assignee acceptable to the Commission could be located. Any of those alternatives would have punished Chameleon without harming the public through the demise of KFCC(AM).

9. KFCC(AM) is a unique broadcast outlet. Many ethnic minorities rely upon the station daily to receive programming directly targeted to their cultural needs. Smoots intends to continue this unique programming if the Commission authorizes Chameleon to assign the license to him pursuant to the distress sale policy. Permitting Chameleon to assign the station to Smoots pursuant to the Commission's distress sale policy will benefit the public in many ways while still severely punishing Chameleon.

10. Unfortunately, if this distress sale request is not granted, the station will likely remain dark for a significant amount of time because of the Commission's current freeze on accepting applications for new radio licenses and the amount of time involved in auctioning off the license. Indeed, due to the high price of an auctioned license, it is likely that if this Petition is not granted, the station will not ultimately be owned by a minority, and certainly not by one with Smoots' qualifications. Smoots is committed to operate the station in the same format, infuse capital into the station, upgrade its operation, and provide a city grade contour to Bay City. Thus, the Commission, by granting the instant Petition, can fashion a punishment that quickly eliminates Chameleon's control over the station but allows Bay City to continue to enjoy the diverse programming offered by this station.

IV. THE COMMISSION SHOULD APPLY THE MINORITY DISTRESS SALE POLICY TO THIS CASE.

11. The Commission's distress sale policy is a perfect answer to the dilemma posed by this small station. The Commission created the distress sale policy in 1978 to "further encourage broadcasters to seek out minority purchasers..."¹³ The distress sale policy permits licensees whose licenses have been designated for revocation hearing on basic qualification issues to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest.¹⁴

12. The distress sale policy, which is the only minority policy currently in place at the Commission, accomplishes numerous public policy objectives. First, it rapidly removes a broadcaster who has allegedly engaged in questionable conduct by penalizing him severely. Second, it keeps the troubled station on the air without interruption. Thirdly, it is deregulatory insofar as it halts protracted agency prosecution and saves Commission staff resources. Lastly, it increases the number of minority-owned stations through a market-driven program. Thus, due to the win-win nature of the policy, distress sales have enjoyed widespread support among the broadcast industry and government policy makers.

13. To qualify for relief under the distress sale policy, an applicant must meet the following requirements: (1) the station to be conveyed must be sold at no more than 75% of its fair market value; (2) the proposed assignee must be minority controlled; and (3) the hearing must not

13. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 983 (1978).

14. *Id.*

have yet commenced.¹⁵ The buyer and seller must also provide the Commission with two independent appraisals of the station's fair market value.¹⁶

A. The Sale Price Must Not Exceed 75% of the Station's Fair Market Value.

14. One distress sale requirement provides that the station to be conveyed must be sold at no more than 75% of its fair market value.¹⁷ The Commission established this price limit in an effort to balance its desire to deter licensee misconduct and to promote "significant minority ownership interests in broadcast stations."¹⁸ To determine the station's fair market value, the buyer and seller must each submit an appraisal of the station's fair market value.¹⁹

15. Because Chameleon has not sought distress sale relief until now, Chameleon proposes to sell KFCC(AM) to Smoots for 50% (rather than 75%) of the station's fair market value.²⁰ This will meet the Commission's goal of deterring licensee misconduct while simultaneously promoting the public interest. Both Chameleon and Smoots have obtained commitments from independent broadcast appraisers to provide them with separate appraisals of the station's fair market value should the Commission grant this petition.²¹

15. *See Chestnut Limited Liability Company*, 10 FCC Rcd 1674 (1995), *citing Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980) and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978).

16. *Id.*

17. *Id.*

18. *Lee Broadcasting Corp.*, 76 FCC 2d at 463.

19. *Id.*

20. *See Letter of Intent to Purchase*, dated May 18, 1998, attached as Exhibit 1 hereto.

21. *See Letter to Don Werlinger, President, Chameleon Radio Corp.*, from John W. Saunders, (continued...)

B. The Proposed Assignee Must Be Minority Controlled.

16. The second distress sale requirement specifies that the proposed assignee must be minority controlled, meaning that the minority ownership interest in the proposed assignee must exceed fifty percent or otherwise be controlling.²² Smoots is an African American and would be the station's owner. Therefore, Smoots meets the second distress sale requirement.

17. Smoots, however, does more than simply meet this requirement. Smoots has significant broadcast experience and would be a first-time broadcast licensee. For example, Smoots worked for a number of years at radio station KYOK in Houston, a minority-programmed station. Granting a license to Smoots would be consistent with Congress' intent to facilitate opportunities for small businesses in telecommunications.²³ Smoots' significant broadcast experience will enable him to quickly assume the role of full-time General Manager and FCC licensee. Furthermore, Smoots is from the Bay City area, currently resides there, and is therefore familiar with the community's needs. Accordingly, the

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21. (...continued)
dated May 20, 1998; Letter from Dave Garland to Bernard Smoots; and Letter from Raymond Holmes to Bernard Smoots, dated May 20, 1998, attached as Exhibit 2 hereto.
22. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 983 n. 20 (1978). *See also, Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853 (1982).
23. *See, e.g.*, 47 U.S.C. §§ 257, 309(j) (1997). (“[M]inority and women-owned small business continue to be extremely under represented in the telecommunications field.... Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.”) 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

Commission should recognize that Smoots exceeds the second distress sale requirement and assign the license to him.

C. The Hearing Must Not Have Yet Commenced.

18. Although the Commission has concluded its hearing in this case, good cause exists for the Commission to waive the requirement that the hearing must not have commenced. Waiver of this requirement is appropriate under Section 1.3 of the Commission's Rules, which allows the Commission to waive any provision of its rules on petition if good cause is shown.²⁴

19. Good cause exists in this instance. Allowing the station to be sold to a minority owner would promote all of the goals established by the Commission when it adopted the distress sale policy including, most significantly, increasing diversity among broadcast licensees.²⁵ Like the now defunct tax certificate program, the distress sale policy is a private sector program that provides financial relief to a majority broadcaster while at the same time providing an ownership opportunity to a minority. The Supreme Court has recognized that the distress sale policy has many benefits.²⁶ Additionally, all of the current Commissioners have repeatedly emphasized their desire and commitment to increase the number of minority stations; however, very little has actually been done. This is one of those rare opportunities where the Commission can quickly further its goal without conducting a study or rulemaking, seeking Congressional authority, or facing political opposition.

24. 47 C.F.R. § 1.3 (1996).

25. *Statement of Policy On Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 983 (1978).

26. *See Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 67 RR 2d 1353 (U.S. Sup. Ct. 1990).

20. The Commission's goal of increasing minority ownership among FCC licensees through the distress sale policy is even more important today than when the Commission adopted the policy in 1978. Twenty years ago (in 1978), the Commission had several means of increasing minority ownership, including issuing minority tax certificates and awarding preferences for minority ownership in comparative broadcast hearings. Today, only the distress sale policy remains. Studies show that the number of minority-owned broadcast stations has decreased in recent years.²⁷ Accordingly, the Commission should utilize this policy now. As set forth above, good cause exists for the Commission to waive this distress sale requirement.

21. The Commission should be concerned that the use of the distress sale policy in this instance would in effect give Chameleon two bites at the apple because the election of distress sale relief normally must occur before the hearing. Chameleon, however, is seeking distress sale relief after the hearing has concluded. In doing so, Chameleon is not acting in bad faith, but rather, was not aware of the Commission's distress sale policy until March 1998, just one month before the Commission released its Decision, when Chameleon hired undersigned counsel. If Chameleon had been aware of this policy before the hearing commenced, it would likely have suggested this as a possible remedy at that time.

27. In 1996, there was a loss of 26 Black radio stations: 8 AM stations and 18 FM stations. In 1994, there was a net loss of seven Black radio stations, and in 1995, there was a net gain of ten Black radio stations. The large drop in 1996 is likely due to the Telecommunications Act of 1996, which permits licensees to own an unlimited amount of radio stations nationwide, and up to eight radio stations in major markets. Therefore, the loss in the number of Black radio stations is likely to continue, unless the Commission exercises its authority to promote minority-owned broadcast stations. Kofi Ori, *et al.*, BLACKOUT? MEDIA OWNERSHIP CONCENTRATION AND THE FUTURE OF BLACK RADIO, at xiv (Medgar Evers College Press, pub. 1997).

22. Authorizing a distress sale at this time would also conserve Commission resources because, if the Commission does not authorize the distress sale requested herein, Chameleon will have no choice but to appeal the decision.²⁸ The Commission's General Counsel's office is already overloaded with appellate litigation. Consequently, all efforts should be made to settle this matter through an existing policy that substantially benefits the public interest. Furthermore, while any appeal is pending, the station's value would be depressed and the Commission would have to spend additional resources defending its decision. The Commission would also have to face a possible reversal. Accordingly, the distress sale proposed herein should be granted.

V. **CONCLUSION**

23. The Commission has a long history of attempting to increase minority ownership of broadcast and other telecommunications stations. The Commission's distress sale policy is one of the oldest and least controversial methods of advancing this goal. The transaction proposed herein would allow the Commission to utilize the distress sale policy to achieve its intended goal. The transaction proposed herein would also benefit the public interest by keeping KFCC(AM) on the air and by increasing diversity in station programming and ownership. The only legitimate concern is the timing of the licensee's election to seek distress sale relief. This factor does not outweigh the

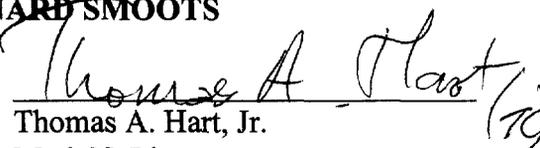
28. *See* Affidavit of Don Werlinger, President, Chameleon Radio Corp., attached as Exhibit 3 hereto.

many reasons for approving this request. Accordingly, the Commission should grant this petition and permit Chameleon to sell KFCC(AM) to Smoots at 50% of the station's fair market value.

Respectfully submitted,

**CHAMELEON RADIO CORP.
BERNARD SMOOTS**

By:


Thomas A. Hart, Jr.

Mark N. Lipp

M. Tamber Christian

Their Attorneys

SHOOK, HARDY & BACON, LLP

801 Pennsylvania Ave., NW

Suite 600

Washington, DC 20004

(202) 783-8400

May 22, 1998

EXHIBIT 1

LETTER OF INTENT TO PURCHASE

May 18, 1998

This letter constitutes a formal offer by Bernard Smoots ("Smoots") to purchase from the Chameleon Radio Corporation ("Chameleon") certain assets which are used or useful in the business and operation of radio station KFCC 1270 AM licensed to Bay City, Texas ("Station") based upon the FCC's Distress Sale Policies and the following terms:

1. A total purchase price not to exceed 50% of the station's fair market value. The fair market value will be determined by two independent appraisals (one commissioned by Chameleon and one commissioned by Smoots). The purchase price will be paid by Smoots to Chameleon as payment in full for the assets and good will of the business and for transfer of the Federal Communications Commission ("FCC") license and any applications currently pending before the FCC. Cash on hand and in the bank, and accounts receivable shall not be transferred. Terms of the payments included in this paragraph are detailed in paragraph 4 below.
2. The conveyed assets consist of all Station broadcast equipment including studio equipment and all equipment located at the Station's Bay City, Texas transmitter site.
3. Smoots will provide a contract for sale and asset purchase agreement ("Contract") to be executed by Chameleon which contract shall contain additional terms and conditions mutually satisfactory to both parties. The parties agree that within twenty (20) calendar days from the date of acceptance by both parties of this Letter of Intent ("Letter"), said contract will be executed by the parties. Smoots has made an inspection of the Station's facilities, is aware of the current state of the Station's facilities and operation, and understands that the equipment sold and assigned by Chameleon to Smoots will be conveyed on an "as is, where is" basis.

Initials:

4. The parties agree that within ten (10) days of the signing of receiving FCC authorization to proceed with the Distress Sale of the Station, each party shall have completed preparation of their respective portions of FCC form 314 application seeking the assignment of the Station's license, permits and applications said application to be presented to the FCC promptly thereafter. The FCC filing fee will be shared equally by the parties.

5. The parties mutually agree to the terms of payment as follows:

Seller shall receive cash in full at closing.

THIS LETTER ACCEPTED this 20th day of May, 1998.

Letter of Intent Tendered by:


Bernard Smoots

Letter of Intent Accepted by:


Don Werlinger, President
Chameleon Radio Corp.

EXHIBIT 2

JOHN W. SAUNDERS
Media Broker

1207 Woodhollow Drive. Suite 3101
Houston. Texas 77057-1684

Phone: 713.789.4222
Facsimile: 713.789.4322

PERSONAL AND CONFIDENTIAL

May 20, 1998

Mr. Don Werlinger, President
Chameleon Radio Corporation
10865 Rockley Road
Houston, Texas 77099

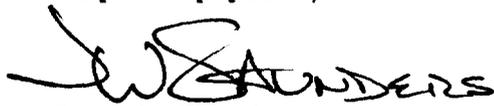
Dear Mr. Werlinger:

In brief, my qualifications to perform appraisal assignments are over thirteen years experience as a media broker with specialization in the sale of radio broadcast properties on a nationwide basis. During this time, I have served as the exclusive intermediary between sellers and buyers in the sale and transfer of approximately fifty radio stations with a total sale value in excess of \$25 million.

Of particular interest, with regard to KFCC-AM, is that a further area of specialization for me is standalone AM stations. I have brokered on an exclusive basis the sale of approximately twenty-five standalone AM radio properties ranging in value from \$30,000 serving a small radio market to approximately \$5 million serving a Top 10 radio market. In addition, I have served as the court appointed media broker to assist Trustees when a radio property has been placed in receivership.

Mr. Werlinger, please let me know if you need additional information. Should you decide to engage my services, I can provide you with an appraisal in two weeks or less.

Very truly yours,


John W. Saunders

JWS/sj

**Dave Garland
Media Brokerage
532 Magnolia Bend
League City, Texas 77573
281-332-1790
garland@radiobroker.com
<http://www.radiobroker.com>**

**Mr. Bernard Smoots
4210 Worrell Dr.
Houston, Texas 77045**

Ref: Radio Station KFCC-AM Bay City, Texas

Dear Mr. Smoots:

This letter is to advise you that I would be happy to help you with an appraisal of KFCC in Bay City. My estimate for completion of the work would be in the 10 to 15 day frame after accumulation of the necessary data. I am aware of the station's FCC problems and your need to have a document ready ASAP.

I have been involved in the radio station brokerage business for over 7 years and have been involved in radio station transactions that ranged in price from \$90,000 to over \$4 Million. My broadcasting experience extends from weekend DJ to being general manager.

Best regards,



Dave Garland



INVESTMENT MANAGEMENT & RESEARCH, INC.

Member NASD/SIPC

Raymond L. Holmes
Financial Advisor

MAY 20, 1998

RE: PROPOSED AM STATION

DEAR MR. SMOOTS:

I HAVE REVIEWED YOUR FINANCIAL STATEMENT AND BUDGET FOR A NEW AM BROADCASTING STATION IN BAY CITY. I AM CONFIDENT THAT WE WILL BE ABLE TO ASSIST YOU WITH FINANCING.

I BELIEVE THAT YOUR MANY YEARS OF EXPERIENCE IN THE RADIO BUSINESS COUPLED WITH YOUR FAMILIARITY WITH THE BAY CITY MARKET WILL ENABLE YOU TO SUCCESSFULLY OPERATE A NEW AM STATION.

THE FOLLOWING RATES AND TERMS ARE SUBJECT TO CHANGE:

AMOUNT -	\$125,000
RATE -	2 - 2.5% OVER PRIME RATE AS PUBLISHED IN THE WALL STREET JOURNAL.
COLLATERAL -	COLLATERAL TO BE PLEDGED TO BE DETERMINED.

THIS FINANCING OFFER IS SUBJECT TO APPROVAL OF THE OPERATING LICENSE BY THE FCC AND SUBJECT TO AGREEMENT ON THE TERMS AND CONDITIONS OF THE CREDIT FACILITY.

IF YOU HAVE FURTHER QUESTIONS, PLEASE ADVISE. GOOD LUCK WITH THE APPLICATION PROCESS.

SINCERELY,

RAYMOND L. HOLMES
FINANCIAL ADVISOR

EXHIBIT 3

AFFIDAVIT

I, Don Werlinger, do hereby certify under penalty of perjury that the following statements are true and correct to the best of my knowledge, information and belief:

1. I am President of Chameleon Radio Corporation;
2. I have reviewed the attached Petition for Reconsideration of Chameleon Radio Corporation and attest to the accuracy of the statements made therein;
3. I have an agreement in principle, as evidenced by the Letter of Intent included herein, to sell KFCC(AM) to Bernard Smoots pursuant to the Commission's Minority Distress Sale Policy;
4. I am prepared to comply with the Commission's distress sale procedures necessary to effectuate the assignment of KFCC(AM) to Bernard Smoots; and
5. Should the request for distress sale attached hereto not be granted, I will file an appeal of the case with the U.S. Court of Appeals for the D.C. Circuit.

By:



Don Werlinger
President, Chameleon Radio Corporation

Date:

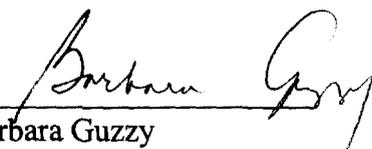
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CERTIFICATE OF SERVICE

I, Barbara Guzzy, a secretary in the office of Shook, Hardy & Bacon, L.L.P., do hereby certify that a copy of the foregoing Petition for Reconsideration was hand delivered this 22nd day of May, 1998, to:

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Suite 8210
Washington, DC 20554

Alan Aronowitz
Federal Communications Commission
Mass Media Bureau
2025 M Street, NW
Suite 8210
Washington, DC 20554


Barbara Guzzy