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### The Evolution of Distress Sales: A Direct Benefit to Non-Minorities

J. Clay Smith Jr.

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HEARINGS BEFORE THE SENATE COMMERCE COMMITTEE  
SUBCOMMITTEE ON COMMUNICATIONS  
HELD SEPTEMBER 15, 1989

THE EVOLUTION OF DISTRESS SALES:  
A Direct Benefit to Non-Minorities

by J. Clay Smith, Jr. Esq.  
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Cynthia Mabry, Esq. and  
Lisa C. Wilson, Esq.

ON BEHALF OF NATIONAL BAR ASSOCIATION<sup>1/</sup>

I. INTRODUCTION

It is a pleasure to be here today before the Senate Subcommittee on Communications to discuss the state of minority ownership of broadcast facilities. A public discussion of this topic is quite timely in light of the recent decisions by the D.C. Circuit dealing directly with the validity of the FCC's minority enhancement policy and the FCC's distress sale policy.<sup>2/</sup>

<sup>1/</sup> National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy. J. Clay Smith, Jr., Esq. is currently a Professor of Law at Howard University School of Law in Washington, D.C. Erroll D. Brown, Esq. is currently an associate at O'Malley, Miles and Harrell in Landover, Maryland. Cynthia Mabry, Esq. is currently an associate at Crowell and Moring in Washington, D.C. Lisa C. Wilson, Esq. is currently an associate at Fisher, Wayland, Cooper and Leader in Washington, D.C. All views expressed are those of the authors and of the National Bar Association, and do not express the views of the authors' respective employers.

<sup>2/</sup> See Winter Park Communications, Inc. v. FCC, No. 88-1755 (D.C. Cir. April 21, 1989) (held, awarding qualitative enhancement credit to broadcast applicants that have minority ownership does not violate the equal protection clause of the Fifth Amendment); Shurberg Broadcasting of Hartford, Inc. v. FCC, No. 84-1600 (D.C. Circuit, March 31, 1989) (held, distress sale policy violates Fifth Amendment (continued...))

As many of you are already aware, there has been, and there continues to be a dearth of minority owners of broadcast facilities.<sup>3/</sup> The FCC recognized this fact in 1977 when Republican-appointed FCC Chairman Richard Wiley and Commissioner Benjamin Hooks held the first FCC Conference of Minority Ownership. This historical conference brought to the forefront a host of government officials, broadcasters and lawyers,<sup>4/</sup> and addressed the concern that minorities were not fairly represented in the broadcast marketplace. However, more importantly, the

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2/(...continued)

because program not narrowly tailored to remedy past discrimination or to promote program diversity).

3/ According to the Department of Minority and Special Services of the National Association of Broadcasters, the percentage of minority-owned broadcast facilities was 2.1% in 1986; only 1.45% of those facilities was Black-owned.

4/ FCC MINORITY OWNERSHIP TASK FORCE, CONFERENCE ON MINORITY OWNERSHIP IN BROADCASTING held April 25 and 26, 1977. (hereinafter referred to as "Conference") The Conference examined the reasons for the underrepresentation of minority owners, and explored ways to increase the number of minority owners. The conference brought together such persons as broadcasters Ragan Henry of Broadcast Enterprises, Skip Finley of Sheridan Broadcasting, Inc., Cathy Hughes formerly with WHUR-FM and now owner of WOL-AM, Washington, D.C., and Rene Anselmo with Spanish International Network; numerous government officials such as J. Clay Smith, Jr. then-Associate General Counsel at the FCC, Norman Blumenthal, then-Assistant General Counsel at the FCC, Roy Stewart, then-Chief of the Assignment and Transfer Branch, and Roderick Porter, then-Legal Assistant to FCC Chairman Richard Wiley; and other industry activists including Herbert Wilkins of Syndicated Communications, Inc., Curtis White, broadcast attorney, Harry Shooshan, then with the House Subcommittee on Telecommunications, Erwin Krasnow, then-General Counsel with the National Association of Broadcasters, Patti Grace, then-Community Affairs Director at the National Association of Broadcasters, Dr. Gloria Walker, Dean, School of Communications Clark College, Atlanta, Georgia, and Dr. Lionel Barrow, Dean, School of Communications, Howard University, Washington, D.C.