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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

ORAL TESTIMONY OF

J. CLAY SMITH, JR.

ON BEHALF OF NATIONAL BAR ASSOCIATION^{1/}

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 as relates to recent actions by the FCC and the court. A public discussion of this topic is quite timely in light of recent decisions by the D.C. Circuit of the U.S. Court of Appeals dealing directly with the validity of FCC's minority enhancement policies and its distress sale

^{1/} 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. In preparing his oral testimony, Professor Smith was assisted by Erroll D. Brown, Esq., currently an associate at O'Malley, Miles and Harrell in Landover, Maryland, Cynthia Mabry, Esq., currently an associate at Crowell and Moring in Washington, D.C., and Lisa C. Wilson, Esq., 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.

policy.^{2/} Because of the D.C. Circuit's recent decision to invalidate the distress sale policy on equal protection grounds, these comments will focus specifically on this policy alone.^{3/}

It is generally settled that an agency's decision not to prosecute or to exercise its administrative enforcement authority is a matter of agency discretion. The Supreme Court itself has recognized the "general unsuitability for judicial review of agency decisions to refuse enforcement." Heckler v. Chaney, 470 U.S. 821, 831 (1985). For example, the Commission is vested with the power to grant a broadcast license without a hearing if it is able to make the finding that to do so results in "the more efficient use of the broadcast spectrum." Absent specific guidelines to determine a precise definition on the "efficient use of the broadcast spectrum," the Commission is left to its own devices on how to pursue its public interest mandate.

In May, 1978, the Commission issued a "Policy Statement on

^{2/} 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. Cir. March 31, 1989) (held, distress sale policy violates Fifth Amendment because program not narrowly tailored to remedy past discrimination or to promote program diversity).

^{3/} For a legal analysis of the Commission's minority and gender enhancement policies, see Wilson, "Minority and Gender Enhancements: A Necessary and Valid Means to Achieve Diversity in the Broadcast Marketplace," 40 Fed. Comm. L.J. 89 (1988).

Minority Ownership of Broadcast Facilities."^{4/} In issuing the Policy Statement, the Commission exercised its administrative enforcement discretion by introducing a measure whereby non-minority licensees, who were either facing a revocation hearing or who have had issues designated against their renewal application significant enough to warrant a hearing, could opt to sell their stations rather than run the risk of engaging in the hearing where they could be stripped of their license altogether. This policy is referred to as the "distress sale policy."

The distress sale policy as adopted in 1978 was not unique because since at least 1966, the Commission had authorized the assignment of licenses in some instances where there were outstanding issues involving the qualifications of the licensee. Assignments such as these were and are now permitted in circumstances where the licensee is either bankrupt, or physically or mentally disabled. In other words, prior to the distress sale policy, the FCC entertained a "Petition for Special Relief" permitting a licensee in violation of its rules to sell its station without invoking the FCC's revocation procedures. In sum, in exceptional circumstances the Commission has exercised its enforcement powers to avoid revocation hearings by Petitions for Special Relief, or by its distress sale policy.

The distress sale policy of the FCC has recently come under scrutiny based on constitutional concerns that this policy

^{4/} See, Policy Statement, 42 RR 2d 1689 (1978) ("Policy Statement").

discriminates against non-minorities. We think that such claims of discrimination are inconclusive. We further believe that the focus on distress sale cases should, indeed, must be on the benefit, if any, to the non-minority licensee prior to and after the implementation of the distress sale policy.

The distress sale policy grew out of a dual recognition by the FCC that it could affect greater diversity in the marketplace through a distress sale policy tied to its enforcement authority. This mixed objective was thought to be well within the public interest mandate prescribed by Congress in 1934 when the Communications Act was adopted. Under the distress sale policy, the public interest was intended to be served by aiding minority entrance into the marketplace and to ease the burden of the exit of non-minorities by sparing them from the death penalty -- the revocation of their license.

Hence, from its inception, one of the dual objectives of the distress sale policy was to provide direct relief to non-minorities. Now, how did this policy directly aid non-minorities? The policy allowed the non-minority to exit his/her existing broadcast business without a costly hearing and permitted the non-minority licensee to salvage 75% or less of fair market value in the sale of their broadcast property. This was an economically beneficial policy for non-minorities because it permitted them to avoid administrative costs by bypassing a revocation hearing and by being able to reap a profit of up to 75% or less of fair market value. In fact, non-minorities

affirmatively sought and gained a clarification from FCC to make the application of the distress sale policy retroactive. A copy of the Clarification of Distress Sale Policy (FCC 78-725), and the FCC News Release, both dated October 11, 1978, are submitted for the record of these proceedings.

For those who would argue that the distress sale policy is not significant because only 38 licenses have been assigned since 1978 pursuant to the policy, this fact may be reflective of the Commission's failure to execute its enforcement authority as it pertains to designating licenses for hearing at renewal time.

In creating another exception to the rule that assignment applications not be granted when there are unresolved qualifications issues against the licensee, the FCC has not created a constitutionally impermissible criteria based on race, rather it has created an enforcement tool that benefits minorities and non-minorities. Therefore, it is imperative that we consider why Shurberg might be wrongly decided. The pro-majority enforcement policy must be taken into account in an analysis of Shurberg. In granting the assignment of licenses without a hearing on the unresolved qualifications issues, the Commission essentially conceived a remedy to what they apparently viewed as a problem that needed solving. The Commission's enforcement discretion was clearly articulated in the Policy Statement, where the Commission stated:

"...in order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for

hearing on basic qualifications issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price..."

Policy Statement at 1695.

The distress sale policy is constitutionally permissible because it benefits minorities and non-minorities equally.