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The FCC's Minority Tax Certificate Program: A Proposal for Life After Death

Erwin G. Krasnow*

Lisa M. Fowlkes**

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I. INTRODUCTION

There are two types of Federal Communications Commission (FCC or Commission) regulation: "Jewish mother" and positive incentive. The all-too-familiar Jewish mother approach relies on raised eyebrows, guilt, and punishment, whereas positive incentive is permissive and offers rewards to encourage certain types of behavior. The minority tax certificate policy was an example of the latter. It used the market-based incentive of deferral of capital gains to encourage the owners of broadcast and cable properties to sell them to minorities. Tax certificates also were issued to investors who provided start-up capital of minority-controlled companies.

Congress eliminated tax certificates in the spring of 1995 and less than one year later enacted the Telecommunications Act of 1996 (1996 Act or Act).[1] This Act ushered in a new era in the broadcast industry—one where increased consolidation of ownership of broadcast stations has resulted in limited opportunities for minority entrepreneurs to own broadcast properties and to compete meaningfully in the broadcast industry.[2] Minority entrepreneurs also continue to face difficulties competing in the telecommunications industry largely as a result of their continued inability to acquire access to sufficient capital to compete in the provision of wireless and other communications services.[3] These circumstances have led to calls for the reestablishment of the FCC's Minority Tax Certificate Program—a mechanism that prior to its elimination by Congress in 1995, enabled significant numbers of minorities to purchase broadcast and cable properties. Indeed, one of the main proponents of this program has been FCC Chairman William E. Kennard, the first African American to head the FCC.[4]

This Article first examines the history and benefits of the FCC's previous minority tax certificate program and the reasons why Congress

1. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. *See generally* NTIA, U.S. Dep't of Commerce, *Minority Commercial Broadcast Ownership in the United States* (visited Mar. 15, 1999) <http://www.ntia.doc.gov/opadhome/minown98> [hereinafter *NTIA Report*].

3. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, 12 F.C.C.R. 16,802, para. 215, 7 Comm. Reg. (P & F) 1112 (1997) [hereinafter *Market Entry Barriers Report*].

4. *See, e.g., Kennard Suggests New Approach to Tax Certificates*, COMM. DAILY, Nov. 12, 1998, at 1.

eliminated it in 1995. The Article suggests ways in which a new tax certificate program could be developed to address those concerns.[5] In short, the Authors believe that the tax certificate program is worth restoring, especially in light of the erosion of the number of minority-owned stations and cable properties and the goal of enabling minorities to benefit from the ownership opportunities presented by the Telecommunications Act of 1996.

II. THE HISTORY AND BENEFITS OF THE FCC'S MINORITY TAX CERTIFICATE PROGRAM

A. *The Minority Tax Certificate Program: A Method of Fostering Program Diversity*

The FCC's tax certificate policy was based on former section 1071 of the Internal Revenue Code, which empowered the Commission to certify that a sale or exchange of property is "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations . . . ."[6] Congress enacted this section in 1943 in response to the FCC's adoption that same year of so-called "multiple ownership rules."[7] These rules limited the number of broadcast stations that a company could own in a single market and nationwide. "Section 1071 was originally designed to

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5. Many of the proposals are based on suggestions proffered by William E. Kennard when he served as the FCC's General Counsel. *See FCC's Tax Certificate Program: Hearing Before the Senate Comm. on Finance*, 104th Cong. 102 (1995) (statement of William E. Kennard, General Counsel, FCC).

6. 26 U.S.C. § 1071(a) (repealed 1995). This section provided, in pertinent part:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of section 1033. For purposes of such section . . . stock of a corporation operating a radio broadcasting station, whether or not representing control of such corporation, shall be treated as a property similar or related in service or use to the property so converted. The part of the gain, if any, on such sale or exchange to which section 1033 is not applied shall nevertheless not be recognized, if the taxpayer so elects, to the extent that it is applied to reduce the basis for determining gain or loss on sale or exchange of property, of a character subject to the allowance for depreciation . . . , remaining in the hands of the taxpayer immediately after the sale or exchange, or acquired the same taxable year.

Id.

7. *Multiple Ownership Rule*, 47 C.F.R. § 73.3555 (1998).

lessen the hardship imposed on broadcasters who were forced to divest stations under the multiple ownership rules."[8]

In the late 1970s, the FCC sought to create new opportunities for minority ownership in broadcasting. Several organizations, including the National Association of Broadcasters (NAB), National Telecommunications and Information Administration (NTIA), the National Black Media Coalition, and the Congressional Black Caucus, met in 1977 under the auspices of the FCC to address the underrepresentation of minorities in broadcasting. That year, the NAB filed a *Petition for Rule Making* urging the FCC to extend its tax certificate policy to promote minority ownership.[9]

Under this program, a seller could acquire a tax certificate under two circumstances: (1) when an owner of a broadcast or cable property desired to sell to a minority purchaser, and (2) when an investor that contributed "start-up" capital to a minority-controlled entity operating a broadcast or cable property sold an interest in that company. The tax certificate enabled the seller in either case to defer the payment of federal income taxes otherwise due if: (a) the proceeds were reinvested in appropriate "qualified replacement property" and/or (b) to the extent any of the gain attributable to the ownership interest sold, the seller elected to reduce the tax basis of appropriate depreciable property (whether or not used in connection with a broadcasting or cable business) owned immediately after the sale acquired within the same taxable year of the sale. This program allowed sellers to defer the payment of taxes to encourage the sale or investment in minority-controlled companies operating a broadcast or cable property. The seller's anticipated tax savings also enabled the minority company to negotiate for a reduction in the purchase price.

In adopting this policy in 1978, the Commission concluded that:

> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.[10]

Moreover, the Commission concluded that "affecting programming by means of increased minority ownership—as is also the case both with

8. Erwin G. Krasnow et al., *Maximizing the Benefits of Tax Certificates in Broadcast and Cable Ventures*, 13 HASTINGS COMM. & ENT. L.J. 753, 754 (1991).

9. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, *Public Notice*, 68 F.C.C.2d 979, 983, 42 Rad. Reg. 2d (P & F) 1689, 1695 (1978) [hereinafter *1978 Policy Statement*]. *See also* Policy Statement on Minority Ownership of Cable Television Facilities, *Public Notice*, 52 Rad. Reg. 2d (P & F) 1469 (1982) [hereinafter *1982 Policy Statement*].

10. *1978 Policy Statement*, 68 F.C.C.2d at 981, 42 Rad. Reg. 2d at 1692.

respect to [its] equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions."[11] The Commission reached similar conclusions in extending the program to cable television in 1982.

> As in broadcasting, adequate representation of minority views in cable television programming enhances the goal of diversified programming which is an objective of both the Communications Act of 1934 and of the First Amendment. Moreover, because cable television system operators exercise editorial discretion with respect for broadcast program selection and cable origination programming, insensitivity on their part to minority issues and viewpoints could undercut our continuing efforts to increase the diversity of viewpoints in programming.[12]

Thus, the Commission viewed the Minority Tax Certificate Program not simply as a method of increasing minority ownership of broadcast and cable facilities, but as a nonintrusive method of encouraging the diversity of ideas and viewpoints in both broadcast and cable programming.

B. *The Minority Tax Certificate Program: A Successful Tool for Increasing Minority Participation in the Communications Industry*

On close examination, it is quite clear that the FCC's Minority Tax Certificate Program fulfilled the goals intended by the Commission. Indeed, the program apparently worked so well that Congress itself instructed the Commission to consider tax certificates as a method of ensuring opportunities for minorities and other entrepreneurs in spectrum-based services subject to competitive bidding.[13]

For the taxpayers that sold their broadcast or cable property, the program allowed a deferral of taxes on any gain from the sale that otherwise would have been due to the Internal Revenue Service (IRS).[14] In addition, the certificates permitted taxpayers to diversify a portfolio of assets on a tax-free basis.[15]

At the same time, this program made it easier for minority entrepreneurs to purchase broadcast and cable properties by providing them with a bargaining chip by which they could negotiate a reduction in purchase

11. *Id.*
12. *1982 Policy Statement*, *supra* note 9, at 1471.
13. 47 U.S.C. § 309(j)(4)(D) (1994).
14. Krasnow et al., *supra* note 8, at 756.
15. *Id.*

price.[16] As a result, this program opened doors at financial institutions that previously had been closed to minority entrepreneurs.[17]

More importantly, the FCC's Minority Tax Certificate Program was an effective and nonintrusive tool in increasing the number of minority owners in the broadcast and cable industries that, in turn, furthered what Congress itself once called "the Nation's policy favoring diversity in the expression of views in the electronic media."[18] Prior to the adoption of the minority tax certificate policy in 1978, minorities owned only 40 out of 8,500 broadcast stations. During the more than fifteen years of the policy's existence, the issuance of minority tax certificates resulted in the acquisition of 288 radio stations, 43 television stations, and 31 cable systems.[19] "According to a study by the National Association of Black Owned Broadcasters, the vast majority of major-market minority broadcasters used tax certificates to attract initial investors, to purchase a broadcast station or to sell a broadcast property to another minority."[20]

The success of the tax certificate program in fostering increased participation of minorities in the broadcast and cable industries apparently led Congress, in enacting the competitive bidding provisions of the Communications Act in 1993, to authorize the FCC to use the certificate as a tool 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."[21] Indeed, the FCC adopted tax certificates as a measure to ensure the participation of minorities and women in the provision of narrowband[22] and broadband PCS services[23] as well as other wireless services subject to competitive bidding.[24] In adopting the use of tax certificates in these and other wireless

16. *Id.* at 755. *See also* Erwin Krasnow, *A Case for Minority Tax Certificates*, BRDCST. & CABLE, Dec. 15, 1997, at 80 [hereinafter Krasnow, *Minority Tax Certificates*].

17. Krasnow, *Minority Tax Certificates*, *supra* note 16.

18. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 22(a)(2), 106 Stat. 1460.

19. Krasnow, *Minority Tax Certificates*, *supra* note 16.

20. *Id.* at 80.

21. 47 U.S.C. § 309(j)(4)(D) (1994).

22. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Third Report and Order*, 9 F.C.C.R. 2941, paras. 81-84, 75 Rad. Reg. 2d (P & F) 230 (1994).

23. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Report and Order*, 9 F.C.C.R. 5532, paras. 142-47, 75 Rad. Reg. 2d (P & F) 859 (1994) [hereinafter *Competitive Bidding Fifth Report and Order*].

24. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fourth Report and Order*, 9 F.C.C.R. 2330, paras. 48-52, 75 Rad. Reg. 2d (P & F) 188 (1994) (permitting the use of tax certificates in the Interactive Video and Data Service (IVDS)).

services, the Commission stated that this tool would reduce obstacles faced by minorities and women in accessing capital by "encourag[ing] investment in minority and women-owned companies."[25] Thus, it is clear that by 1995, tax certificates had proven to be a significantly successful tool in reducing obstacles to minority ownership in the communications industry.

C. *The Decision to Kill the Minority Tax Certificate Program: To Pay for a New Tax Benefit or Eliminate a Perceived "Minority Preference" Program?*

Despite the many public interest benefits of the FCC's Minority Tax Certificate Program, Congress repealed the program in 1995.[26] Several reasons played a role in Congress's decision. The primary reason members of Congress offered for eliminating the FCC's tax certificate program was that doing so was necessary to pay the costs of restoring a popular healthcare tax deduction for farmers and the self-employed.[27] However, the primary catalyst for the action was a plan by Viacom to sell its cable systems to a minority-led group for $2.3 billion and to use the tax certificate to defer $400 million in federal taxes and as much as $200 million in state taxes.[28] Many members of Congress voiced outrage at what they perceived was a giant tax loophole for big corporations. For example, in debating the repeal of the FCC tax certificate program, Senator Robert Dole described the program as a "tax break for millionaires."[29] Similarly, Senator Larry Pressler stated, "[w]hen the choice is between giving multibillion dollar corporations a tax break or giving small businesses, farmers and ranchers relief for health insurance coverage, the choice is clear."[30] Members of the House expressed similar sentiments. For example, Representative Sam Johnson called the Minority Tax Certificate Program a "voluntary, loosely-defined, unsupervised, open-ended tax giveaway entitlement program."[31]

The Minority Tax Certificate Program received additional criticism as another example of an unfair preference based on race. Representative Phillip Crane, for example, called the repeal of the program an end to "the

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25. *Competitive Bidding Fifth Report and Order, supra* note 23, para. 143. These certificates were eliminated from the FCC's rules once Congress repealed section 1071.

26. Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. § 1071 (1994)).

27. Krasnow, *Minority Tax Certificates, supra* note 16.

28. *Id. See also* Mark Bobichaux, *A Cable Empire that Was Built on a Tax Break*, WALL ST. J., Jan. 12, 1995, at B1.

29. 141 CONG. REC. S4551, S4559 (daily ed. Mar. 24, 1995) (statement of Sen. Dole).

30. *Id.* at S4557 (statement of Sen. Pressler).

31. 141 CONG. REC. H1912, H1922 (daily ed. Feb. 21, 1995) (statement of Rep. Johnson).

discriminatory provision that falls under the definition of affirmative action."[32] Senator Robert Packwood characterized the program as a "set[] aside [of] part of the television and radio spectrum for women and minorities."[33]

Aside from these issues, both the Senate and House Reports accompanying each version of the legislation raised concerns about the administration and implementation of the FCC Minority Tax Certification Program. For example, one concern raised was whether the FCC, in establishing the Minority Tax Certificate Program, had ventured "far beyond what Congress originally contemplated" in enacting section 1071.[34] In this regard, the Senate argued that while Congress originally had intended section 1071 to "alleviate the burden of taxpayers who had been forced to sell their radio stations under difficult wartime circumstances," the FCC had interpreted the provision to permit the grant of "unlimited tax benefits for routine and voluntary sales of a wide range of communications properties."[35]

In addition, Congress raised concerns regarding what it characterized as "vague" FCC standards that according to Congress, allowed instances of "significant abuse."[36] For example, the Senate questioned whether the FCC's definition of "control" provided any assurance that a minority would manage the broadcast property it had acquired through the certified sale.[37] Moreover, both the House and Senate expressed concern over what they perceived to be the short periods of time that minority entities appeared to hold on to properties acquired through certified transactions. The Senate, for example, stated that because of the FCC's one-year holding period, section 1071 had "frequently resulted in only transitory minority ownership of broadcast properties."[38] Similarly, the House cited average holding periods for broadcast stations acquired in certified transactions of 2.25 years for television licenses and 3.5 years for radio licenses as evidence that the program did not result in *bona fide* minority ownership.[39]

Congress also raised concerns about the administration of the program. Specifically, it noted that the program had not been supervised or reviewed by the IRS, or any other government body that could evaluate the

32. *Id.* at H1923 (statement of Rep. Crane).

33. 141 CONG. REC. S4532, S4538 (daily ed. Mar. 24, 1995) (statement of Sen. Packwood).

34. S. REP. NO. 104-16, at 17 (1995), *reprinted in* 1995 U.S.C.C.A.N. 89, 98.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. H.R. REP. NO. 104-32, at 13 (1995).

tax cost of the program.[40] Further, it argued that the FCC failed to consider these issues[41] or to require a showing or representation that any of the benefits of the program actually went to the minority buyer.[42] Finally, Congress questioned the soundness of a policy that would allow a federal government agency broad discretion to implement an "open-ended entitlement program with no constraints."[43]

Although there arguably was merit to some of Congress's specific concerns regarding the tax certificate program, many criticisms were based either on misinformation or misunderstandings about the program. Political ideology also played a significant role in the decision to end the program. Many conservative members of Congress had a simple desire to end what they viewed as an unfair minority preference.[44] However, contrary to views expressed during the congressional debates, the tax certificate program did not involve a "set-aside" or "preference" in the award of spectrum licenses to minorities. The program did not result in the denial of licenses to white-owned businesses and did not guarantee the grant of a license to the minority entrepreneur. Indeed, the program offered no guarantee to minority entrepreneurs regarding the success or profitability of the broadcast station or cable system once acquired.

Moreover, the program was completely voluntary. Sellers were not required to sell to minorities and were not penalized if they chose not to do so. Rather, the Minority Tax Certificate Program offered a tax-based incentive to sellers to sell their properties to minorities. In this regard, the program was no different than other tax benefits that exist for sales of property. Indeed, it is noteworthy that, despite Congress's actions, Viacom was still able to take advantage of other existing tax-saving provisions when it ultimately sold its cable properties.[45] Thus, the only thing Congress put an end to was the sale of those properties to a minority-owned company.

Second, contrary to the suggestions by some members of Congress, the tax certificate program did not involve a "tax giveaway." Rather, this program allowed sellers to defer capital gains taxes on the sold property. The federal government still enjoyed the benefits of receiving taxes on the transaction and of indirectly receiving taxes from the new minority-owned

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40. S. REP. NO. 104-16, at 17; H.R. REP. NO. 104-32, at 13.
41. S. REP. NO. 104-16, at 17.
42. *Id.*
43. *Id.*
44. *See supra* notes 29-33.
45. Krasnow, *Minority Tax Certificates*, *supra* note 16.

business.[46] Thus, it was inaccurate to claim that the program resulted in a loss of millions of dollars in tax revenue. Indeed, the program actually provided benefits to taxpayers.

> By involving otherwise excluded minorities in media ownership, more broadcast and cable properties reached their highest valued use, thereby creating jobs and generating investment and tax revenues. [Moreover,] the policy's reinvestment feature retain[ed] capital in media industries, where it help[ed] to build the communications infrastructure. Furthermore, the policy help[ed] minority businesses succeed and ultimately become taxpayers.[47]

In addition, minorities who purchased properties in certified transactions did receive benefits—the opportunities to compete with members of the "old boys network" in the acquisition of communications properties and, thus, to participate as owners in the communications industry. The American people also benefited because this increase in minority ownership resulted in the offering of a more diverse array of views and programming on the electronic media. Moreover, in originally authorizing the FCC to use tax certificates as a method of ensuring opportunities for designated entities in spectrum-based services subject to auction, Congress was, in effect, recognizing the benefits of tax certificates in increasing opportunities for minority participation in the communications industry. In light of these facts, it is clear that the Minority Tax Certificate Program provided benefits to minority entrepreneurs as well as to the American people in general. As explained in the next Part, the time is ripe for reestablishing this program as a method for ensuring minority participation in the communications industry for the next millennium.

III. REESTABLISHING THE TAX CERTIFICATE PROGRAM: AN INCENTIVE-BASED APPROACH TO PROMOTING PUBLIC INTEREST OBJECTIVES

The current state of minority participation in the communications industry underscores the need for reestablishment of the tax certificate program not only in the broadcast and cable industries, but also in all communications industries, including services subject to competitive bidding. The Telecommunications Act's provisions relaxing the broadcast ownership rules[48] have resulted in a significant increase in the concentration of broad-

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46. MINORITY MEDIA & TELECOMMUNICATIONS COUNCIL, WHY THE FCC'S TAX CERTIFICATE POLICY SHOULD BE RETAINED 3 (1995).

47. *FCC's Tax Certificate Program: Hearing Before the Senate Comm. on Finance*, 104th Cong. 131 (1995) (statement of the Minority Media & Telecommunications Council).

48. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56, 110-12.

cast ownership in local markets. This has, in turn, resulted in an increase in prices for broadcast properties, making it more difficult to purchase stations. These circumstances have led some media brokers to declare that "'[r]adio, for all practical purposes, is consolidated.'"[49] As a result, minority entrepreneurs have fewer opportunities to compete meaningfully for the purchase of broadcast entities. Indeed, the most recent *NTIA Report* reflected only a 2.9 percent level of minority ownership of commercial broadcast stations—a level lower than that in the years immediately preceding the elimination of the program.[50] Moreover, the few existing minority broadcast station owners now must compete against non-minority group owners who, because of their ownership of as many as eight radio stations in some markets, can assume greater control over advertising revenues, programming, and staff.[51] In fact, as entertainer Stevie Wonder, who owns station WJLH-FM in Los Angeles, testified before the FCC on February 12, 1999, these difficulties are even more prevalent for single station owners, even affluent owners such as Mr. Wonder.[52]

In addition, as the Commission's *Market Entry Barrier Report* revealed, access to financial capital continues to be a major obstacle to minorities in all communications industries.[53] In the broadcast industry, this limited access has forced many minorities to be relegated to the purchase of less costly and less viable AM stations or FM stations in smaller markets.[54] Further, Congress's decision to subject mutually exclusive commercial broadcast stations to competitive bidding[55] may further impede the ability of minorities and women to acquire new stations by making the pursuit of such stations even more capital intensive.

Minority entrepreneurs also continue to face difficulty obtaining sufficient capital to acquire licenses and compete in telecommunications services, including those subject to competitive bidding.[56] This difficulty has been exacerbated by the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*,[57] that led the Commission to cease adoption of auc-

49. Elizabeth A. Rathbun, *Going, Going, Gone . . .* , BRDCST. & CABLE, Feb. 15, 1999, at 33 (quoting Brian Cobb of Media Venture Partners).

50. *NTIA Report*, *supra* note 2. "Minority ownership of commercial broadcast stations is at a lower level today than in 1994 and 1995."

51. *Id.*

52. Bill McConnell, *Songs in Key of LMA Restriction*, BRDCST. & CABLE, Feb. 15, 1999, at 10.

53. *Market Entry Barriers Report*, *supra* note 3, para. 215.

54. *NTIA Report*, *supra* note 2.

55. *See* 47 U.S.C.A. § 309(j)(1) (West Supp. 1998).

56. *Market Entry Barriers Report*, *supra* note 3, para. 215.

57. *Adarand*, 515 U.S. 200 (1995).

tion provisions that provided bidding credits and other incentives to minorities and women.[58]

A new tax certificate program clearly could address this obstacle. Such a program could provide a much needed tax-benefit incentive for sellers of communications facilities to sell their licenses to minority entrepreneurs. A new tax certificate program could also ensure opportunities for minority entrepreneurs to compete for ownership in all communications industries including those subject to competitive bidding.[59]

In the view of the Authors, the FCC as the expert agency on communications matters should administer this new program. Congress's concern regarding the lack of monitoring by the IRS could be addressed by requiring the IRS to monitor the tax implications of the program and to report its findings to Congress and to the President. Further, the FCC could be required to coordinate with the Department of Treasury to set limits on the amount of tax-deferred benefits in a given transaction to ensure efficient use of the tax-deferred benefits. To facilitate oversight responsibility, the FCC and the IRS could form a joint working group to coordinate their respective policies for the issuance and use of tax certificates.[60]

The new tax certificate program should apply not only to broadcast and cable properties, but also to all other communications services. As noted above, minorities continue to have difficulty accessing capital not only in the purchase of broadcast and cable properties, but also in all spectrum-based services. Applying the program to all of these services would foster "the diversity of control of a limited resource, the spectrum"[61]—a goal the Commission found to serve the public interest.

58. *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Sixth Report and Order*, 10 F.C.C.R. 136, para. 1, 78 Rad. Reg. 2d (P & F) 934 (1995) (eliminating minority and female-specific auction incentives for the PCS C block auction in light of the *Adarand* decision). As the Commission noted in its *Market Entry Barriers Report*, many parties complained that they actually lost investors when the Commission eliminated these provisions for the PCS C block auction in response to *Adarand*. *Market Entry Barriers Report*, *supra* note 3, para. 219 n.543.

59. Providing the Commission with authority to establish a tax certificate program that would apply to services subject to auction as well as to broadcast and cable would restore to the Commission the authority it held prior to 1995. As noted above, Congress specifically authorized the Commission to consider tax certificates among the tools used to ensure that small businesses, minority and women entrepreneurs, and rural telephone companies obtained opportunities to participate in spectrum-based services subject to competitive bidding.

60. The proposal for a joint FCC/IRS working group was suggested in Erwin G. Krasnow and William E. Kennard, *A Constructive Proposal to Improve the FCC's Tax Certificate Policies*, BRDCST. CABLE FIN. J., Sept.-Oct. 1992, at 30-31.

61. *1978 Policy Statement*, 68 F.C.C.2d at 981, 42 Rad. Reg. 2d at 1692.

Adoption of a new tax certificate program that applied to auctionable services would provide the Commission with a continued mechanism to fulfill Congress's continuing mandate under the Communications Act to "ensure that small business, 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."[62] In addition, this program would allow the Commission to fulfill another requirement imposed in the Telecommunications Act to "eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services"[63] and to "seek to promote the policies and purposes of this Act in favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[64]

Reestablishing the tax certificate program would also foster the participation of woman-owned businesses in the communications industry. As the Commission noted in its *Market Entry Barriers Report*, woman-owned businesses, like minority-owned businesses, have also faced difficulty in attracting capital.[65] Moreover, as is the case with respect to minority-owned businesses, Congress has continued to recognize the need for dissemination of licenses to a wide variety of applicants including women[66] and to require the Commission to ensure opportunities for the participation of woman-owned businesses in spectrum-based services.[67]

Any statutory authority given to the Commission under the new tax certificate policy, should permit, but not require, the FCC to make the program available to all small businesses. Such authority would be consistent with the authority the Commission held prior to 1995 with respect to spectrum-based services subject to auction. Moreover, this approach would be consistent with Congress's mandate that the Commission eliminate market entry barriers for small businesses. Indeed, as the Commission found in its *Market Entry Barriers Report*, small businesses also found it difficult to access capital for purposes of acquiring communications facilities.[68] Finally, the establishment of a tax certificate program geared toward small business would likely carry significantly fewer litigation risks from those

62. 47 U.S.C. § 309(j)(4)(D) (1994).
63. *Id.* § 257(a) (1994 & Supp. II 1996).
64. *Id.* § 257(b).
65. *Market Entry Barriers Report*, *supra* note 3, para. 215.
66. 47 U.S.C. § 309(j)(4)(C) (1994).
67. *Id.* § 309(j)(4)(D).
68. *Market Entry Barriers Report*, *supra* note 3, paras. 30-37.

who would be inclined to challenge the program under *Adarand* and *Lutheran Church-Missouri Synod v. FCC*,[69] at least until such time as the Commission can complete its efforts to gather sufficient evidence in support of minority and woman-specific incentives to withstand judicial scrutiny.[70] In fact, as former FCC Commissioner Henry Rivera suggested, there is evidence that minority and female entrepreneurs would benefit from a program geared toward small businesses.[71] For example, despite the existence of business incentives limited to small businesses, minority entrepreneurs have been successful in acquiring a total of 496 licenses in wireless services subject to auction. This number includes licenses for capital-intensive businesses such as those licensed to the Broadband Personal Communications Service and the Local Multipoint Distribution Service.[72] In light of these factors, the better approach, at least initially, would be to establish a tax certificate program that applies to small business entities.[73]

The concerns raised by Congress in 1995 could be addressed under a new statutory authority. For example, any concern that the FCC would create a program that extended beyond the intent of Congress could be addressed by enacting a statute that set forth the specific parameters by which the Commission could implement a tax certificate program. Similarly, Congress's concerns regarding the FCC's administration of the program could also be addressed in such a statute. To eliminate the "flipping" of broadcast and cable properties acquired through the use of a tax certificate, Congress could require the Commission to establish a longer holding period for entrepreneurs who purchase properties pursuant to tax certifi-

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69. *Lutheran Church*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

70. In *Lutheran Church*, the D.C. Circuit questioned the nexus between program diversity and employment of minorities at broadcast stations. *Lutheran Church* involved the FCC's equal employment opportunity rules, while the tax certificate program would address more directly minority ownership, which the Authors believe has a closer nexus to diversity of programming. However, because both policies, at least with respect to broadcast and cable, originally were intended to foster program diversity, the potential exists for the *Lutheran Church* decision to be used as the basis for challenging a minority-specific tax certificate program. Although the Authors would prefer a new tax certificate program focused on minority and female entrepreneurs, the realities of the current congressional and judicial climate suggest that, at least in the short term, a more pragmatic approach would be to establish a program aimed at small businesses.

71. *Kennard Suggests New Approach to Tax Certificates*, *supra* note 4. Former FCC Commissioner Rivera noted that any program geared toward small businesses would aid minority businesses as well.

72. This information was provided by the Federal Communications Commission, Wireless Telecommunications Bureau, Auction and Industry Analysis Division.

73. Under a sufficiently broad statutory authorization, the FCC could adopt minority and female-specific tax certificate incentives should it decide that it has sufficient evidence to withstand judicial review.

cates. In addition, Congress could require the FCC to adopt more stringent definitions of "control." For example, in authorizing the Commission to implement a tax certification program, Congress could require the FCC to adopt a specific threshold of equity that a minority or other entrepreneur must hold in the purchasing company and require integration of ownership and management to protect against "fronts" or shams. Further, to address Congress's previous concern regarding the financial magnitude of transactions that were subject to the previous tax certification program, Congress could require that the FCC set limitations on the amounts for transactions that would qualify for a tax certification. For example, Congress might direct the Commission to establish a maximum amount for broadcast transactions, another amount for cable transactions, and other amounts for various wireless service transactions. Because the program would be used as an incentive for a variety of different services, the Commission should be given the discretion to tailor the transaction size limitations to the characteristics of each service.

Finally, Congress's concern regarding lack of monitoring of the benefits of the program could be addressed by a requirement that the Commission submit a report to Congress and the President regarding the status of the program. Such an approach would be consistent with previous requirements regarding other communications regulatory policies.[74]

IV. CONCLUSION

Minorities continue to face difficulty accessing capital and, as a result, remain grossly underrepresented in the ownership of broadcast, cable, and other communications facilities. This problem has been exacerbated by the broadcast multiple ownership provisions of the Telecommunications Act as well as recent court decisions restricting the use by the FCC of minority-specific programs. These developments have resulted in a decrease in opportunities for minorities (and women) to participate in the communications industry. These circumstances create a compelling public interest in reestablishing the tax certificate program. As demonstrated above, the previous program proved to be a highly effective, nonintrusive method for promoting minority ownership in the communications industry. More importantly, the tax certificate program should be reinstated by the Congress because it is the right thing to do.

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74. *See, e.g.*, 47 U.S.C. § 332(c)(1)(C) (1994) (requiring the FCC to release an annual report on competitive market conditions with respect to commercial mobile radio services); *Id.* § 548(g) (requiring the FCC to submit to Congress an annual report on the status of competition in the market for the delivery of video programming).