FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON

January 12, 1990

OFFICE OF
THE CHAIRMAN

The Honorable Dick Thornburgh
Attorney General
United States Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

I am writing to reiterate the request that we have already made to the Solicitor's office that the Department of Justice defend the Commission in two cases now pending in the Supreme Court. As you probably are aware, on January 8, 1990, the Supreme Court granted certiorari in Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., S.Ct. No. 89-700 and Metro Broadcasting, Inc. v. Federal Communications Commission, S.Ct. No. 89-453. These cases involve longstanding FCC policies designed to increase the ownership of broadcast stations by minorities. In Metro Broadcasting, the U. S. Court of Appeals for the District of Columbia Circuit upheld our policy of giving credit in a comparative hearing for a new broadcast station to an applicant that proposes to have minority owners who will be actively involved in the station's operation. This enhancement for minority ownership and participation is weighed as one factor in our multi-factor comparative evaluation of competing applicants. In upholding the policy, the court of appeals simply followed its earlier decision in West Michigan Broadcasting Corp. v. FCC, 735 F.2d 601 (D.C. Çir. 1984), cert. denied, 470 U.S. 1027 (1985).

A different panel of the D.C. Circuit held unconstitutional another of our policies, known as the "distress sale" policy, in Astroline Communications. Under that policy, an existing licensee whose license has been designated for a hearing on the licensee's qualifications, is permitted to sell its station at a "distress" price of no more than 75% of fair market value, to a buyer that is controlled by members of certain specified minority groups.

Since 1987 Congress has statutorily mandated the comparative enhancement and distress sale policies. It is particularly significant that these policies are mandated by Congress because, as Justice O'Connor indicated in City of Richmond v. J.A. Croson, Co., 109 S.Ct. 706 (1989), Congress has the power, not enjoyed by state and local governments, "[to] identify and redress the effects of society-wide discrimination." The broad congressional authority in this regard led the Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980), to sustain a federal statute in which a benefit was awarded solely on the basis of race.

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Minorities, for a variety of reasons, acquired few if any broadcast licenses when this industry was developing and generally when the most desirable spectrum was awarded. As of 1988, minorities controlled just 3.5% of all broadcast licenses, although this is a substantial increase as compared to ownership before the institution of the Commission's policies.

Congress had at least as abundant a basis for enacting into law the distress sale and minority enhancement policies as the Court found adequate in Fullilove. Congressional consideration of this question is reflected not only in hearings that preceded the 1987 appropriations legislation, but also in a number of earlier proceedings. Yet the court of appeals refused in the Astroline case to afford any degree of deference to Congress' judgment that the distress sale policy was an appropriate method for increasing minority participation in the broadcasting industry.

The congressional policies at issue here also find support in the broad authority afforded the government to seek to enhance the diversity of broadcast programming. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978). Justice Powell in Regents of the University of Calif. v. Bakke, 438 U.S. 265, 311-12 (1978), approved the diversity rationale as a justification for a race conscious policy in the context of an institution of higher education. The court of appeals in West Michigan extended Justice Powell's reasoning in Bakke to the broadcast context and the Supreme Court declined to review that decision.

In addition, the comparative enhancement policy at issue in the Metro Broadcasting case is only one of many factors that the FCC considers in granting new broadcast licenses rather than a decisive factor in itself. Use of race in such a limited manner has been viewed favorably in several Supreme Court decisions. See Bakke, 438 U.S. at 317-18 (Powell, J.); Johnson v. Transportation Agency, 107 S.Ct. 1442, 1455 (1987).

We believe that it should be apparent from the above discussion that, however the Supreme Court ultimately resolves the two FCC cases now before it, there is a solid foundation in the Supreme Court's precedents for the government to argue that the FCC's policies are constitutional. We therefore request the Department, with its considerable expertise in Supreme Court practice, to defend the constitutionality of these policies before the Supreme Court on our behalf. I recognize that there may be some reluctance in the Solicitor's office to do so. In view of this and the fact that the Supreme Court has accelerated the briefing schedule in these cases, I am available to discuss this matter with you at your earliest convenience.

Sincerely,

Alfred C. Sikes
Chairman

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1/9/90

Bob Pettit — GC / FCC.

2 dist. cases —

being touted in press as test of Admin. Civ. Rights policy.

+ sensitivity of all

Happy to talk abt cases —

John Roberts at S.G. handling.

Reluctance to defend Commission's posit.

Coms are 4-0 that should defend policies —

consistently expressed Cong. concern.

Will go to Depty. A.G. —

Brief in 1st case due Feb. 9th if defend policies.

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