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MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

3636 16th Street N.W., Suite BG-54
Washington, D.C. 20010
Phone: (202) 332-0500 Fax: (202) 332-0503
e-mail: mmtcbg54@aol.com

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October 18, 1999

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Docket Nos. MM Docket Nos. 94-150, 92-51 and 87-154 (Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests)

On behalf of the Minority Media and Telecommunications Council ("MMTC"), transmitted herewith are the original and eleven copies of our "Petition for Partial Reconsideration and Clarification" of the Report and Order in the above-referenced proceeding, FCC 99-207 (released August 6, 1999 ("Attribution Report and Order").

We propose that:

1. The Commission should grandfather the nonattributable nature of equity/debt plus ("EDP") interests in most socially and economically disadvantaged small business concerns ("SDBs"), irrespective of whether the EDP provider subsequently acquires other properties which otherwise would cause the EDP interest to be attributable to the EDP provider.

2. When a broadcaster provides an SDB with an EDP interest that enables the SDB to build out an unbuilt permit, the EDP interest should be deemed nonattributable, and the EDP provider should be reserved a place in line to subsequently duopolize or crossown another same-market station.

3. A licensee making a good faith effort to divest a newly attributable interest to an SDB should be afforded an additional six months to complete the divestiture.

We respectfully request an opportunity to meet with Bureau officials, along with other affected parties, to explore the feasibility of our proposals.

Respectfully submitted,

David Earl Honig
Executive Director

Enclosures

/dh

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

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

TO THE COMMISSION

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

The Minority Media and Telecommunications Council ("MMTC"), pursuant to 47 CFR §1.429, respectfully requests the Commission to reconsider in part and clarify its Report and Order in Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, FCC 99-207 (released August 6, 1999) ("Attribution Report and Order").1/

On this day, we are filing a Petition for Partial Reconsideration and Clarification in the TV local ownership proceeding.2/ We incorporate it herein by reference, particularly our discussion of the plight of small and minority broadcasters. Id. Herein, we offer three proposals to improve the new attribution rules by promoting diversity.

I. The Commission Should Grandfather The Nonattributable Nature Of EDP Interests In Small And Disadvantaged Businesses

MMTC proposes the grandfathering of the nonattributable nature of equity/debt plus interests ("EDP Interests") in most socially and economically disadvantaged small business concerns ("SDBs"),3/ irrespective of whether the entity providing the EDP Interest (the "EDP

1/ The views expressed in this Petition are the institutional views of MMTC, and do not necessarily reflect the individual views of its officers, directors or members.

2/ "Petition for Partial Reconsideration and Clarification of the Minority Media and Telecommunications Council" in Review of the Commission's Regulations Governing Television Broadcasting, MM Docket Nos. 91-221 & 87-8 (filed October 18, 1999) ("MMTC TV Local Ownership Petition").

3/ This term is defined precisely in the SBA's governing statute. See 15 U.S.C. §631(a)(4)(A) (1999) and discussion in the MMTC TV Local Ownership Petition at 1 ns. 2-3 and 18 n. 57.

Provider") subsequently acquires other properties which otherwise would cause the EDP interest to be attributable to the EDP Provider.

In the proceedings below, MMTC supported the EDP concept, recognizing it as a well-intentioned effort to discourage fraud while also encouraging broadcasters to invest in or lend to small concerns. However, the new EDP rules have an unintended consequence: they may discourage broadcasters from providing an EDP Interest to any SDB anywhere in the country, irrespective of whether the potential EDP Provider is presently a same-market media entity or a major program supplier to the SDB.

This unfortunate outcome is caused by the fact that the potential EDP Providers are also among the nation's largest broadcasters. They are jockeying for position and dominance in a rapidly consolidating national market for broadcast properties. In this consolidating marketplace, broadcasters of national scope are structuring their station portfolios so they can acquire other companies, or be acquired themselves, with a minimum of spinoffs and divestitures. Other factors being equal, companies select merger partners that "fit" well -- i.e., the combination of their properties will require few spinoffs. Spinoffs dislocate employees; they entail transaction costs and executive time; they often cannot be effected at optimal value; and they sometimes provide opportunities for competitors to delay the regulatory approval process through legal challenges.

Consequently, broadcasters usually find it disadvantageous to hold small, potentially attributable interests in markets not critical to their growth strategies. These nonstrategic interests could become attribution time bombs that would explode upon a sizeable merger or acquisition. In positioning itself for future acquisitions, a broadcaster will not want to laden its portfolio with these time bombs that would make its bid for an acquisition target noncompetitive with the bids of other companies.

An EDP Interest in an SDB would be an exceptionally volatile attribution time bomb. This EDP Interest could become attributable if the acquisition target owns another station in the SDB's market (a "Potentially Overlapping Station"). Thus, if an EDP Provider wishes to bid for this acquisition target, the EDP Provider would be compelled to structure its bid either to exclude or spin off the Potentially Overlapping Station, or to reduce or extinguish its EDP Interest in the SDB. These requirements would increase the cost, risk and time for such an acquisition, making the EDP Provider's bid for the acquisition target relatively less attractive to both the EDP Provider and the target. The opportunity costs of a foregone merger, or the merger's higher transactional

costs if undertaken, would likely far exceed the profit potential of any EDP Interest in any SDB. Realizing this, most large broadcasters would probably not go to the trouble of providing EDP Interests to SDBs.

The nonstrategic nature of EDP Interests in SDBs helps explain why these interests are relatively rare even now. Converting them into attribution time bombs could wipe them out entirely, rendering a potentially valuable source of debt and equity unavailable to SDBs. This is the opposite of the small business investment climate the Commission wants to foster.

The Commission can cure this problem by grandfathering otherwise nonattributable EDP interests in SDBs in situations where these four conditions are met:

1. the EDP Provider merges with, acquires, or is acquired by a company unrelated to the company holding a nonattributable EDP Interest in an SDB (an "Unrelated Transaction");

2. the Unrelated Transaction occurs at least a year after the EDP relationship was formed;

3. the Unrelated Transaction would otherwise cause the EDP Provider's EDP Interest in the SDB to become attributable; and

4. the EDP provider and the SDB make an affirmative showing that the EDP Provider does not exercise undue influence over the SDB. 4/

This abuse-free procedure would promote diversity by avoiding any inadvertent disincentivizing of EDP Interests in SDBs.

4/ The Attribution Report and Order opened the door slightly to such an approach. Id. at 23 ¶4 ("we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review.") Flexibility to conduct this kind of review is particularly appropriate in light of the inability of citizen groups to police abuses. Citizen groups have traditionally carried the burden of proving that an equity or debt provider had not captured or dominated the equity recipient or debtor company in violation of (inter alia) the former crossinterest rule. This process of uncovering abuses was unreliable and inefficient, leaving most abuses uncovered. Citizen groups are ill suited to carry these burdens because they lack access to witnesses and internal corporate documents, and because no citizen group can match a large broadcaster's litigation war chest.

While fraud or abuse of process remain independent grounds upon which to deny a renewal, transfer or assignment application, the public will be better protected if the burden of proof were shifted to the proponents of the EDP relationship. These companies have complete and usually exclusive access to all of the facts and documents the Commission would need to determine the genuineness of their relationship. Such a showing should include proof that the companies are independent of one another on such well known factors as voting rights, options and poison pills, station management, programming plans, sales strategies, financing terms, legal representation and family relationships. See generally, e.g., Trinity Broadcasting of Florida, Inc., FCC 98-313 (released April 15, 1999) (appeal pending, Trinity Broadcasting of Florida, Inc. v. FCC, No. 99-1183 (D.C. Cir.)

II. The Commission Should Not Attribute EDP Interests, And Should Vest Multiple Ownership Rights, For An EDP Provider Who Finances An SDB's Construction Of An Unbuilt Station

MMTC proposes that when a broadcaster provides an SDB with an EDP Interest that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the EDP Provider should be reserved a place in line to subsequently duopolize or crossown another same-market station.

SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.

SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It could be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.

To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.

When the unbuilt station signs on, the number of independent local voices would increase by one, but might still be insufficient to make room for another duopoly or TV/radio crossownership. Anticipating that scenario, the Commission should also afford the EDP Provider a vested right to the processing of its application to buy its complement of duopolized or crossowned stations. This right would vest on the date the contract with the SDB is filed with the Commission. This vested right would provide the large broadcaster with the secure knowledge that its public spiritedness in making an especially risky investment in an SDB will be rewarded with a guaranteed opportunity to acquire a full complement of local properties.

This EDP Interest nonattribution, compled with this vested right to grow in the market, would powerfully incentivize companies to provide equity and debt to SDBs in a manner that promotes diversity.5/ The vested right to grow in the market would also provide a safety valve to

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5/ Because this proposal seeks relief both from the EDP rule and the local ownership rules, it has been crossfiled in the TV Local Ownership Proceeding. See MMTC TV Local Ownership Petition at 17-18.

relieve some of the pressure for another round of consolidation from those who lose the races to the courthouse.6/ Those who didn't win these races to the courthouse will have another route to assemble a duopoly -- a route which would cause the replacement of the duopolized voice with a new voice owned by an SDB.

III. The Commission Should Afford Licensees Additional Time To Complete Divestitures To SDBs

MMTC proposes that a licensee making a good faith effort to divest a newly attributable interest to an SDB should be afforded an additional six months to complete the divestiture.

When companies are acquired or merge, interests that are presently nonattributable lose that protection and must be divested, as must other non-grandfathered interests acquired after November, 1996. These divestitures typically must occur in 12 months.7/ However, in MMTC's experience, a year is often not enough time to permit SDBs, particularly those owned by minorities, to acquire the capital needed for a major acquisition.

The Commission has recognized that minorities often need more time to overcome their historic difficulties in accessing the capital markets; other SDBs may face similar difficulties. Thus, on an ad hoc basis, the Commission has extended waiver periods where broadcasters have promised good faith efforts to attempt to spin off stations to minorities.8/ Given this additional time, SDBs have succeeded in raising capital and paying market prices for spinoff stations.

We propose that the Commission amend the attribution divestiture rule to provide that a licensee making a good faith effort to divest a newly attributable interest to an SDB will be afforded an additional six months to complete the divestiture. Such a policy would offer broadcasters the secure knowledge that their efforts to promote diversity will be met with regulatory flexibility appropriate to the task. This policy would cause even more companies to build SDB spinoffs into their merger plans -- an outcome that profoundly serves the public interest.

6/ See MMTC TV Local Ownership Petition at 9 (explaining why the Commission might feel the need to allow those who lose the races to the courthouse to duopolize as well.)

7/ Attribution Report and Order at 72 ¶171.

8/ See, e.g., Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (granting 18 month temporary crossownership waiver because "we believe that Viacom's proposal to seek out minority buyers for the two [Washington, D.C.] radio stations would be impossible for it to administer were we to require an immediate divestiture"); cf. Midwest Communications, Inc., 7 FCC Rcd 159, 160 (1991) (holding that a "forced" sale could unnecessarily restrict the value of the station and artificially limit the range of potential buyers, to the exclusion of minorities).

Conclusion

The Attribution Report and Order requires only modest fine-tunes. The ones we have proposed should have a substantial impact. We invite the industry's support and its suggestions on how our proposals could be improved, and we encourage the Commission to call together all interested parties to think through how these proposals could be implemented in the most logical and efficient way.

Respectfully submitted,

David Earl Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite BG-54
Washington, D.C. 20010
(202) 332-7005

Of Counsel:

Fatima Fofana
MMTC Law Clerk

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