

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

In the Matter of

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Review of the Commission's Regulations  
Governing Television Broadcasting

MM Docket No. 91-241  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Television Satellite Stations Review  
of Policy and Rules

MM Docket No. 87-8

TO THE COMMISSION

**REPLY TO OPPOSITIONS TO PETITION FOR  
PARTIAL RECONSIDERATION AND CLARIFICATION**

The Minority Media and Telecommunications Council ("MMTC") respectfully replies to the December 2, 1999 opposition of the National Association of Broadcasters ("NAB Opp.") and to the December 2, 1999 Opposition of the Local Station Ownership Coalition ("LSOC Opp.")<sup>1/</sup>

In its Petition for Partial Reconsideration and Clarification ("MMTC Petition"), MMTC asked the Commission to adopt six policies to foster broadcast ownership by socially and economically disadvantaged small businesses ("SDBs"). One of these proposals, which MMTC crossfiled in the companion attribution proceeding, was unopposed.<sup>2/</sup>

At the outset, MMTC respectfully takes issue with the central premise underlying LSOC's Opposition: that while regulatory benefits afforded large broadcasters are inviolate, small broadcasters must prove future harm to themselves before the Commission may enact rules and policies benefitting them.

To its credit, LSOC stated that it "does not challenge the goal of promoting minority ownership in broadcasting. There are significant hurdles confronting small business, women and minority owners in broadcasting. The number of women and minority owned broadcast facilities

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

<sup>2/</sup> See MMTC Petition for Partial Reconsideration and Clarification (Attribution), MM Dockets 94-150, 91-51 and 87-154 (filed October 18, 1999) (asking the Commission to consider nonattributable an EDP interest that enables an SDB to build out an unbuilt permit). This petition also asked the Commission to grandfather the nonattributable nature of EDP interests in most SDBs, and to provide an extra six months for attempted divestitures of newly attributable EDP interests to SDBs. *Id.* No party opposed these proposals.

is appallingly low." LSOC Opp. at 4.<sup>3/</sup> However, LSOC doubts that "the empirical case has been made" that relaxation of the local television ownership rules will have a negative impact on minority ownership. *Id.* LSOC would disable the Commission from adopting any regulation benefitting small businesses unless small businesses first prove that other rules -- presumed valid simply because they help large businesses grow larger -- will in the future harm small businesses.

LSOC's theory is a throwback to the discredited Divine Right of Kings. Under LSOC's approach, broadcasting's Kings are presumed worthy of relief, but its serfs must first prove the unprovable -- that future events will cause them harm.

In considering MMTC's proposals to benefit small businesses, the Commission should apply the same test it applied to adopt rules benefitting duopolists. That test is whether the proposals would yield better service for the public. MMTC's proposals have merit irrespective of whether the relaxation of the TV local ownership rules improves or inhibits minority ownership. Thus, even if duopolies somehow benefitted SDBs, the Commission still ought to consider proposals, such as MMTC's, that would benefit SDBs even more. MMTC's proposals should be adopted if they will have a positive impact on ownership by SDBs without disastrous consequences for others.

Nonetheless, even if the Commission reviews MMTC's proposals using LSOC's test -- that duopolies must first be shown likely to impede small business opportunity -- MMTC's proposals would easily pass muster. There is a fixed number of TV stations. The new rules allow large businesses to become larger by buying more of these stations. Consequently, these rules will reduce the number of stations available for small broadcasters to buy, increase the pressure on small broadcast investors to force their principals to sell, and double the cost of entry for small broadcasters by compelling them to buy two stations in order to compete effectively. See MMTC

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<sup>3/</sup> It is puzzling that LSOC would say that "[m]inority owned media companies, following the dictates of market forces, program to a variety of diverse audiences. The marketplace, not the characteristics of the owner, dictates program content." LSOC Opp. at 3. n. 3 LSOC appears to have confused formats with viewpoints. Certainly, minorities have chosen a wide variety of formats and have undertaken to serve a wide variety of audiences. However, as the Commission has long recognized, a minority broadcaster who chooses to serve a predominately White audience often provides that audience with views that audience would not normally encounter. See, e.g., Waters Broadcasting Co., 91 FCC2d 1260, 1264-1265 ¶¶8-9 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F 2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). Indeed, the evidence is overwhelming that an integrated coterie of broadcast licensees provides a range of viewpoints far more expansive than the range of viewpoints Americans would receive if those in control of America's broadcaster stations all were White. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990) (discussing extensive research that found a nexus between minority ownership and programming).

Petition at 2-11. LSOC did not, nor could it offer any logical argument showing how large broadcasters' ownership of a bigger piece of a finite pie would not, inevitably, reduce opportunities for small broadcasters.

LSOC acknowledged that the number of minority owners has substantially declined over the past few years. LSOC Opp. at 7. LSOC cannot explain how this reduction in the number of minority voices benefits the public interest. However, LSOC attempted to make the case that relaxations of ownership limits in 1992, 1994 and 1996 did not destroy minority ownership entirely. LSOC pointed out that in a few of the years since 1992, the number of minority owned stations increased slightly. LSOC Opp. at 5-6. Yet such increases do not mean that the rule relaxations had no effect. The question the Commission should ask is how many minority owners would still be in business, and how many more stations minorities would have owned, if the Commission had retained regulatory protections for small broadcasters.

At the end of the day, LSOC's opposition to even the mildest SDB ownership incentives is poorly taken because Congress has other intentions. Congress has instructed the Commission to take steps to diversity media ownership,<sup>4/</sup> and it has instructed all federal agencies to design regulations benefitting SDBs.<sup>5/</sup> LSOC did not show that the policies advocated by MMTC were inconsistent with these congressional instructions. Nor did LSOC show that any burdens on large broadcasters caused by MMTC's proposals would be more than speculative or slight, or that any such burdens would not be far outweighed by the benefits of MMTC's proposals.

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<sup>4/</sup> See, e.g., Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102nd Cong. 2d Sess. 1992, at 60; H.R. Conf. Rep. 97-765, at 26 ("[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public.") Several provisions of the Telecommunications Act address this issue. See 47 U.S.C. §151 (revised in 1996 to explicitly require that licensing and regulation occur "...without discrimination on the basis of race, color, religion, national origin, or sex"); 47 U.S.C. §257 (directing the Commission to promote the policies and purposes of the act favoring diversity of media voices, vigorous economic competition and technological advancement); 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services).

<sup>5/</sup> See MMTC Petition at 2 n. 3 (citing the Small Business Economic Policy Act of 1990, 15 U.S.C. §631(a) and (b) (1994)).

**1. The Commission Should Terminate All LMAs If Small And Minority Television Ownership Is Endangered**

MMTC's Petition described the probable sharp decline in small and minority ownership that would result from the new ownership rules. MMTC Petition at 2-11. Since no one can soothsaying precisely how sharp this decline will be, MMTC's proposed "a genuine, properly funded monitoring program which would allow [the Commission] annually to determine the status of minority and SDB ownership." MMTC Petition at 11. Neither the NAB nor LSOC contended that such a monitoring program would not be a worthwhile undertaking. Nor did they defend the adequacy of the TV Local Ownership Order's skeletal promise merely to "monitor the effects of the relaxation of our local TV ownership rules on new entry." 6/

Nonetheless, the NAB and LSOC parted company with MMTC on the question of what the Commission should do with the information learned from this monitoring. MMTC proposed that in order to provide advance guidance to the industry and the public, "the Commission should state now -- unequivocally -- that if minority or SDB ownership falls dramatically, LMAs must end." MMTC Petition at 11. NAB opposed this step because "the Commission in fact found that television LMAs produce operating efficiencies and public interest benefits." NAB Opp. at 5; see also LSOC Opp. at 9. Yet if the Commission felt that most LMAs served the public interest, it would hardly have needed to adopt new rules aimed at phasing them out.

There is a way to harmonize the MMTC and NAB/LSOC positions on the relative value of LMAs. If the Commission finds it necessary to terminate LMAs in order to save SDB and minority ownership, it can do so in a manner that preserves any especially valuable LMAs -- those that incubate SDBs or minorities.

LSOC opposed MMTC's proposal on four additional grounds.

First, LSOC noted that MMTC's proposal contemplates a uniform national LMA policy. LSOC would prefer that LMA policy be established on a market-by-market basis. LSOC Opp. at 10. That approach would be unwise. Both national and local rules governing television ownership have always been designed to be uniform across the nation. LSOC's proposal that these policies be micro-structured on a market-by market basis would require a sharp departure from three

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6/ Review of the Commission's Regulations Governing Television Broadcasting (Report and Order), MM Docket Nos. 91-221 and 87-8, FCC 99-209, 14 FCC Rcd 12903, 12910 ¶13 (1999) ("TV Local Ownership Order").

generations of uniform national standards for television structural regulation.<sup>7/</sup>

Second, LSOC contended that existing LMAs cannot affect future minority or SDB ownership. LSOC Opp. at 10. But the present is always prologue. Most LMA'ed stations are nondominant or underperforming. If they were not locked up in LMAs, they would be ideal acquisition targets for turnaround experts with more sweat than cash to invest. Thus, every existing LMA deprives the transactional marketplace of a station that would be especially desirable for most small or new entrants. As additional duopolies remove even more stations from the reach of small and minority broadcasters, the continued presence of LMAs self-evidently inhibits minority and SDB ownership. The hoarding of life preservers today assuredly contributes to drownings tomorrow.

Third, LSOC noted that other factors besides media concentration could inhibit SDB and minority ownership. LSOC Opp. at 10. But the fact that drownings are not the only cause of death is no argument against boat safety. Highly favored, successful broadcasters ought not be immune from even the very slight short-term economic impact that could attend an advance in opportunities for SDBs and minorities.

Finally, LSOC expressed fear that the "economic uncertainty" attendant to possible divestitures would drive capital away from LMAs. LSOC Opp. at 10. LSOC's fears are speculative and unwarranted. From 1996 until the TV Local Ownership Order was adopted, the fate of LMAs was in grave doubt, but capital hardly ran away from LMAs. Instead, even more LMAs were created during this period. Nor is it likely that an uncertain future for LMAs would drive capital from broadcasting generally.<sup>8/</sup> Capital flows into vibrant markets that offer opportunities for new entrepreneurs. Protectionism for established businesses drives away investment capital. A policy that favors new entrants over inherently artificial, spectrum-warehousing, voice-inhibiting TV LMAs would enhance competition and attract new capital to broadcasting.

Once it happens, concentration is virtually irreversible. The possible termination of LMAs is "the only corrective step potentially available under the new rules." MMTC Petition at 11.

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<sup>7/</sup> Imagine the outcry if the Commission refused to deregulate TV ownership except on a market-by-market showing that deregulation would serve the public interest. The chaos, inconsistent outcomes, expense and uncertainty introduced by such a regime would surely not meet with LSOC's approval.

<sup>8/</sup> Without explaining why, LSOC contended that "MMTC's plan will drive capital away from all broadcasting, including minority broadcasters." LSOC Opp. at 10.

Neither the NAB nor LSOC has identified any alternative steps that could be taken to remedy a sharp decline in SDB or minority ownership. To its credit, the NAB has recently invested in the Prism Fund, a laudable venture, endorsed by MMTC, that will do much to narrow the opportunity gap. But it will take more than money to solve this problem. Venture capital, tax incentives, and regulatory guidance and incentives are all needed to reverse decades of unequal opportunity.

The specter of losing half of the nation's minority owned TV stations is obviously unacceptable and repugnant. Thus, it is only fair that at the earliest possible date, the Commission provide notice of its intentions if such a scenario presents itself.

**2. The Commission Should Require Sellers Of Failed, Failing, Or Unbuilt Stations To Market Their Properties To SDBs**

MMTC proposed that sellers of failed, failing or unbuilt stations be required to market their properties so as to provide SDBs with reasonable notice of their availability and a reasonable opportunity to bid. MMTC Petition at 12. The rules already provide for public notice of a sale to out-of-market buyers, which would also ensure that "minorities and women interested in purchasing a station will have an opportunity to bid." TV Local Ownership Order, 14 FCC Rcd at 12937 ¶74. MMTC's proposal would only add the requirement that SDBs, including minorities, be actively solicited as bidders, following the custom of the station brokerage business which relies on active marketing rather than just the passive posting of notices.

An active marketing requirement is the only way to prevent a seller from frustrating all SDB or minority bidders. Without an active marketing requirement, a seller could simply post a public notice that the station is for sale, then refuse ever to provide an SDB or a minority with a confidentiality agreement and due diligence package. Without these documents, no one has a reasonable opportunity to bid.<sup>9/</sup>

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<sup>9/</sup> An active marketing requirement would also minimize the possibility of intentional discrimination against minority buyers. Owing to the confidentiality of the station sale process, such discrimination is always unprovable. The Commission has repeatedly recognized that it has jurisdiction over allegations of discrimination in station sales. See Univision Holdings, Inc., 7 FCC Rcd 6672, 6683-6684 (1992); petition for recon. dismissed, 8 FCC Rcd 3931 (1993), (aff'd. by Memorandum sub nom. National Hispanic Media Coalition v. FCC, No. 92-1549 (D.C. Cir., filed October 30, 1992) (finding no discrimination in sale of TV stations and TV network, but reaching the merits); Federal Broadcasting System, Inc., 62 FCC2d 861, 872-873 (Rev. Bd. 1977) (radio station case, to the same effect); cf. NLT Corp., 52 RR2d 817, 819 (1982) (allegation that competing TV station intended to commence racially motivated advertiser boycott against Black owned TV station potential purchaser); cf. Evening Star Broadcasting Company, 68 FCC2d 136-140, and 149-155 (Dissenting Statement of Commissioner Joseph R. Fogarty), recon. denied, 68 FCC2d 158, 159-163 (1978) (alleged breach of provision of citizens agreement providing that seller would consider minority buyers for its newspaper).

LSOC acknowledged that "the concept of requiring advance notice and an opportunity to bid sounds reasonable on its face[.]" LSOC Opp. at 11. Yet NAB and LSOC objected to any notification or marketing requirements, asserting they they could run afoul of Section 310(d) because "requiring licensees to document efforts to sell their stations to certain specified entities essentially constitutes comparative consideration." NAB Opp. at 7; see also LSOC Opp. at 12.

NAB and LSOC have misread Section 310(d), whose only effect was to repeal the Avco rule that had afforded Ashbacker rights at the time of sale to competing applicants not presented by the seller. Section 310(d) does not bar the Commission from requiring sellers to inform a wide range of potential buyers of the availability of the station and provide them reasonable opportunities to bid, while preserving the seller's sole discretion to select the best potential buyer with whom to negotiate a sale.<sup>10/</sup>

LSOC posed a number of questions it characterizes as "details."<sup>11/</sup> LSOC Opp. at 12; see also NAB Opp. at 7 n. 20. LSOC fears that if these issues are not resolved properly, "the potential for abuse by competitors and others is obviously great. The process could add months, if not

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<sup>10/</sup> Section 310(d) states, *inter alia*, that "the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." Congress added this language to Section 310 in 1951 to prevent the Commission from reinstating the Avco rule, which from 1945 until it was abandoned in 1949 had afforded Ashbacker rights to competing applicants to purchase a station. See S. Rep. No. 142, 82nd Cong., 1st. Sess., 8-9 (1951); Powel Crosley, Jr., 11 FCC 1 (1945) (announcing the Avco rule). In Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1, 3 n. 3 (1978), the Commission rejected Commissioner Hooks' proposal for an across-the-board 45 day public notice announcing that a station was for sale, but held that his proposal would not have fallen afoul of Section 310(d) "since our enforcement would be limited to ensuring that a seller published and filed proof of publication with its application."

<sup>11/</sup> LSOC asked "[h]ow much advance notice is necessary? How much time is needed for a reasonable opportunity to bid? Who should receive notice? Will this be a nationwide notification?" LSOC Opp. at 12. These are all fair, practical questions. Our response is that a seller should provide at least the same advance notice and time to bid that the seller provides to non-SDB, out-of-market broadcasters under the new rules. Sellers should not find it difficult to identify eligible SDBs throughout the nation. The NAB's Broadcast Ownership Development Program, the National Association of Black Owned Broadcasters, the American Hispanic Owned Radio Association, the Commission's Office of Communications Business Opportunities, and MMTC know where to find SDBs who are ready, willing and able to purchase television stations.

The NAB asked "if a prospective SDB buyer were in-market, would this supersede the requirement to make an active and serious effort to sell the station to an out-of-market buyer?" NAB Opp. at 7 n. 20. The answer is that the requirement to market to out-of-market buyers and MMTC's proposed requirement to market to SDBs would be separate obligations, although they could be performed concurrently and the target categories may overlap. Given broadcasters' wide experience with transactions and the availability of dozens of experienced brokers, any overlaps should not cause confusion. NAB also wondered whether a permittee facing the end of its three-year construction clock would have time to market to out-of-market buyers and also to SDBs. Id. This ought not be a serious concern. It takes no more time and only marginally more effort to market to 20 potential buyers, including SDBs, as it takes to market to ten traditional buyers.

years, to the sale of a station that already is in financial jeopardy." *Id.* It is difficult to imagine how that could happen. Marketing to SDBs is not difficult. In its role as a nonprofit media broker focusing on minority ownership, MMTC markets stations to minorities routinely and efficiently. Expanding the network of potential buyers usually increases the returns to the seller: higher prices result when there are more buyers. Thus, MMTC's proposal for marketing to SDBs would work with the market rather than fighting the market.

**3. The Commission Should Expedite The Processing Of Applications Filed By Duopoly-Eligible Licensees That Voluntarily Marketed Their Properties To SDBs**

MMTC proposed that sellers of duopoly-eligible stations that have voluntarily marketed their properties to SDBs be afforded expedited processing of their applications. MMTC Petition at 14. The NAB's Opposition did not address this proposal. LSOC did not appear seriously to oppose it, saying only that the proposal "offers little comfort" to financially troubled sellers. LSOC Opp. at 11 n. 13. But the fact that a proposed rule modification is not a cure-all for all problems is no reason not to adopt it.<sup>12/</sup> Since no party has advanced a reason to reject this proposal, it should be viewed as noncontroversial and adopted.<sup>13/</sup>

**4. The Commission Should Allow The Owner Of Any Two Same-Market Television Stations To Sell Them Both To An SDB**

**and**

**5. The Commission Should Allow The Owner Of Any Radio/Television Combination To Sell It Intact To An SDB**

MMTC proposed that the owner of any two same-market television stations should be permitted to sell the combination intact to an SDB, irrespective of the stations' ratings or the number of operating television voices in the market. MMTC Petition at 15. MMTC also proposed that the owner of any TV/radio combination should be permitted to sell the combination intact to an SDB, irrespective of the number of independently owned media voices in the market. *Id.* at 17.

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<sup>12/</sup> LSOC inaccurately stated that "MMTC acknowledges [that] this proposal is beyond the scope for [sic] this proceeding." LSOC Opp. at 11 n. 13. MMTC did recognize that requiring all stations to be marketed to SDBs "might be beyond the scope of this proceeding." MMTC Petition at 14 n. 47. To be fair, regulatees should have an opportunity to comment de novo on proposals to impose new obligations on them that are not expressly contemplated by the terms of reference of a preexisting docketed proceeding. That is not the case for MMTC's proposal. It would impose no new obligations on anyone, being designed only to facilitate voluntary actions in the public interest. Moreover, MMTC's proposal is expressly targeted to duopoly-eligible licensees, who are the subject of this proceeding.

<sup>13/</sup> This proposal falls well within the mainstream of responsible industry practice. Well-managed public companies, including CBS and Clear Channel Communications, already voluntarily market their stations to minorities, and MMTC is proud to assist them.

In response, the NAB stated:

NAB does not object to MMTC's petition urging the Commission to permit the owner of any television duopoly or radio/television combination to sell the stations together to an SDB...Although NAB would go further, so that station owners would be allowed to transfer station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC's petition.

NAB Opp. at 8 n. 24.

MMTC appreciates the NAB's express non-objection to our proposal, and urges the Commission to treat it as noncontroversial and especially deserving of adoption.

LSOC agreed that "[g]iven the FCC's current limitations on the subsequent sale of newly created duopolies, one could argue that MMTC's plan does provide some relief. Certainly, it is better than an absolute ban on the subsequent transfer of a local market combination." LSOC Opp. at 12. However, LSOC doubted that an SDB could gain access to the capital needed to acquire a two-station duopoly. *Id.* at 13. Indeed, without the opportunity offered by MMTC's proposal, LSOC is probably correct -- an unfortunate commentary on the probably anticompetitive effect of the new rules. But once incentivized by MMTC's proposal, an SDB would find it worth the time, effort and expense to raise fair market value to pay for a multi-station combination, knowing that it will not inevitably be outmaneuvered by a larger company that can mobilize capital more rapidly and take advantage of lower interest rates or pro-incumbent tax-free exchanges. Thus, MMTC's proposal would provide some relief from the very disadvantages that LSOC acknowledges that SDBs usually face.

**Conclusion**

MMTC's proposals generated only modest opposition, along with some tentative support. The proposals are noncontroversial fine-tuning of the type customarily undertaken on reconsideration of rules.

MMTC respectfully renews its requests for expedited treatment and for a meeting of interested parties and Commission staff to talk through the practical details of implementation.

Respectfully submitted,



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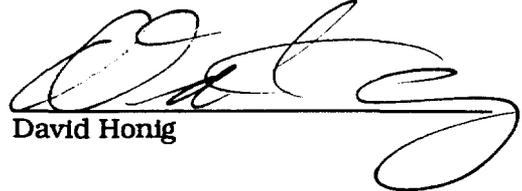
December 15, 1999

**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that a copy of the foregoing "Reply" was sent this 15th of December, 1999 by U.S. First Class Mail, postage prepaid, to the following:

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