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Federal Communications Commission
445 12th Street S.W.
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May 27, 2003 **RECEIVED**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Colleagues:

RE: Broadcast Ownership Omnibus Proceeding
MB Docket 02-277

The Commission is reportedly considering whether to allow a licensee to transfer intact a combination that could not be created ab initio under the local ownership rules. Some have suggested that such combinations should be transferable intact repeatedly; others that they should be transferable only once; and still others that they should not be transferable at all.

In our Comments, we proposed a compromise (the "SDB Transfer Option") that would promote diversity and advance the small business paradigm in Senator McCain's proposed Telecommunications Ownership Diversification Act of 2003, S.267: "allow the owner of such combinations to sell the combination intact to an SDB [socially and economically disadvantaged business]....This would result in no greater concentration of ownership than had existed previously, and it would contribute to diversity

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Hon. Michael Powell
Hon. Kathleen Abernathy
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Kevin Martin
May 27, 2003
Page Two.

by placing valuable properties in the hands of small businesses, particularly minorities." MMTC Comments, pp. 107-108. 1/

In response, the NAB stated that although it "would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser (see NAB's comments at 83-84), whether an SDB or not, NAB does not oppose MMTC's proposal." NAB Reply Comments, p. 44 n. 79. Today, the NAB graciously indicated that it continues its non-opposition to the SDB Transfer Option.

1/ Senator McCain's bill contemplates that the Treasury Department would conduct a rulemaking to determine which groups (e.g. Hispanics or women) are socially and economically disadvantaged in the telecommunications industries. See S.267, Telecommunications Ownership Diversification Act of 2003, Sec. 6(b), which provides, in pertinent part, that

The Secretary of the Treasury, in consultation with the Federal Communications Commission, shall promulgate regulations to implement the amendments made by this Act not later than 90 days after the date of the enactment of this Act. The regulations shall provide for the determination by the Secretary of the Treasury as to whether an applicant is an "eligible purchaser" as defined in section 1071(f) of the Internal Revenue Code of 1986 (as added by section 3(a))[]

Adoption of the SDB Transfer Option need not await the passage of S.267, however. Indeed, the Commission's experience in implementing the SDB Transfer Option could prove valuable to the Treasury Department in developing its own regulations. If S.267 does not become law before the effective date of the new ownership rules, the Commission could follow any of several interim approaches to rendering SDB eligibility determinations. For example, the Commission could draw upon the record compiled in the six Section 257 studies completed in 2000; or it could review transactions case by case based on transferee's individualized showings of social and economic disadvantage; or it could consult with the Treasury Department in adopting an interim eligibility policy. The task of tying down the precise definition of a qualifying SDB is not so daunting that it should prevent the Commission from adopting the SDB Transfer Option as part of the forthcoming Report and Order.

Hon. Michael Powell
Hon. Kathleen Abernathy
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Kevin Martin
May 27, 2003
Page Three.

The advantages of the SDB Transfer Option are many:

First, by allowing some transferability of combinations while still grandfathering existing clusters, the Commission could avoid disrupting incumbents' operations. At the same time, the SDB Transfer Option would disincentivize the accretion of assets in the hands of licensees that may no longer highly value these assets.

Second, the SDB Transfer Option would provide a strong incentive for incumbents to sell stations to new entrants, including many minorities and women. History has proven the value and fairness of incentive-based marketplace initiatives, such as the tax certificate policy and the Mickey Leland Rule. 2/

Third, the SDB Transfer Option would provide SDBs with ownership opportunities that are specifically tailored to the marketplace realities of a consolidating industry. In such an industry, nothing is more desirable than the opportunity to acquire a cluster intact. Such an opportunity would attract urgently needed investment capital to socially and economically disadvantaged

2/ When it created the Mickey Leland Rule, the Commission declared that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership." Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 FCC2d 74, 94 (1985). The Mickey Leland Rule provided that an interest of up to 49% in minority-controlled stations would not be subject to attribution with respect to two stations beyond the otherwise applicable national ownership caps. A similar approach was contemplated by Chairman Sikes' plan to allow those who incubated minority owned companies to acquire additional stations beyond the ownership caps. Revision of Radio Rules and Policies (MO&O and Further NPRM), 7 FCC Rcd 6387, 6391 ¶21 (1992) (concluding that "encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance.")

Hon. Michael Powell
Hon. Kathleen Abernathy
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Kevin Martin
May 27, 2003
Page Four.

businesses, including most broadcast companies owned by minorities. 3/

Fourth and most important, by allowing the transfer of clusters intact to SDBs, the Commission would reduce the risk that its new ownership regulations might diminish diversity and impede minority entrepreneurship.

* * * * *

It has been a privilege to participate in this proceeding. We appreciate the considerable time and thought you and members of your staffs have invested over the past nine months in meeting with us and considering our proposals.

Sincerely,



David Honig
Executive Director

cc: Jane Mago, Esq.
Michele Ellison, Esq.
Henry Baumann, Esq.

/dh

3/ The Commission has recognized that "access to capital is the most critical limitation on minority participation in the industry." Revision of Radio Rules and Policies (R&O), 7 FCC Rcd 2755, 2770 ¶28 (1992); see also MMTC Comments, pp. 36-37 (discussing causes of minority broadcasters' lack of access to capital). Lacking substantial equity reserves of their own, most minority owned broadcasters rely heavily on venture capital ("VC") firms as sources of equity. Unless they can enjoy 30-40% returns from broadcasting, VC firms will invest their resources in other industries. This rate of return is generally attainable only by taking advantage of the synergies flowing from multiple ownership, such as clustering. It is usually impossible for a new entrant to assemble a local cluster one station at a time. Consequently, the opportunity for an SDB to enter a market as a cluster owner is regarded by VC firms as especially attractive.

**TESTIMONY OF DAVID HONIG
EXECUTIVE DIRECTOR, MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, AT THE DETROIT MEDIA
OWNERSHIP HEARING, WAYNE STATE UNIVERSITY, MAY 19, 2003**

Greetings, and profound thanks to Governor Granholm, Mayor Kilpatrick, Senators Levin and Stabenow, Congressman Conyers, Congressman Dingell, Congresswoman Cheeks Kilpatrick, and Commissioner Copps for making possible this, the first public hearing since 1984 on the subject of minority ownership in broadcasting.

Notwithstanding some of Chairman Powell's views on media consolidation, he has proven to be a consistent and aggressive defender of both minority ownership and equal employment opportunity in the broadcast industry.

This hearing is especially timely because this coming Sunday, May 25, will mark the 25th anniversary of the 1978 Minority Ownership Policy Statement, which created the tax certificate and distress sale policies. Those policies were largely responsible for an increase in minority ownership from just 60 stations nationwide in 1978 to over 300 stations just 17 years later. Can anyone think of any other government policy that was so effective?

It's also noteworthy that this hearing is being held in Michigan, since so many of the milestones of what we call "communications civil rights law" occurred here. For example, if I had to name the worst FCC decision of all time, it would be the infamous Voice of Detroit case in 1938, in which the FCC held that a minority group, otherwise perfectly qualified for a broadcast license, and facing no opposition, could be denied the license because of the content of what it wished to broadcast. This holding (long since repealed, fortunately) involved a religious minority -- Jewish people -- who were denied a license because they wanted to broadcast in Yiddish. Some of you who know Detroit's history probably are not surprised -- after all, in 1938, many prominent Detroiters were still helping the other side in what was soon to become World War II.

The Voice of Detroit decision also underscores how futile it was for people of color to seek FCC licenses. Keep in mind that as a practical matter, a person needed broadcast experience to get an FCC license, and since the FCC had given most of the licenses to segregationists, no minorities had had an opportunity to secure the training needed to get a broadcast license. For 35 years, the FCC even gave all of the licenses for noncommercial broadcast training institutions to segregated colleges universities. In this way, a publicly owned resource -- the radiofrequency spectrum -- was handed over almost entirely to one racial group. Even now, the broadcast assets minorities would have owned -- but for discrimination -- are now owned by others who can borrow against these assets and thus raise capital to be used against minorities in bidding contests to purchase other

stations. That is the way that past discriminatory ownership patterns are perpetuated, such that an exclusionary industry continues to replicate itself across generations.

Unfortunately, the FCC has also held that affirmative action to advance minority ownership is not justified by the need to remedy past discrimination. This 1975 holding also involved a station in Detroit -- WGPR-TV, Channel 62. The owners at the time -- the Masons -- had sought a waiver of the broadcast license filing fee. Keep in mind that Channel 62 was the first minority owned television station in the country. The Masons lost by a vote of 5-2, and Detroiters should be proud of the fact that the two sons of Detroit who sat on the FCC, Benjamin Hooks and James Quello, cast the two dissenting votes.

Michigan also figured in the first FCC decision in which a person of color won a broadcast license in competition with white applicants. That 1975 decision, Flint Family Radio, marked the first time the FCC had ever held that a minority broadcast station applicant had qualifications superior to the white applicants.

Finally, Michigan was home to the first FCC ruling that held that minority broadcast ownership benefits not only minorities, but all Americans. A white owned broadcast company had argued that because its competitor, Nancy Waters, was an African American, she had nothing of value to offer to the all-white citizenry of the proposed station's community of license, Hart, Michigan, 30 miles north of Muskegon. In a stunning 1981 decision, the FCC held that minority ownership sometimes benefits white people even more than minorities, because white people need to hear what minorities have to say. Nancy Waters went on to build WCXT-FM and she still owns and operates it today.

So, let's get started. First, what is the state of minority broadcast ownership now?

Today there are about 14,000 full power radio and 1,400 full power television stations. Of the radio stations, about 4% are minority owned, and of the television stations, about 1.5% -- 22 stations -- are minority owned. Just three years ago there were 33 minority owned television stations. Until this March there had not been a minority television station acquisition in three years. Charles Glover, the President of Toledo's Corporate Media Group, is here with us today; his company just bought two television stations after a three year struggle to raise the financing.

Most minority owned stations are small; consequently, all of the minority owned radio and television stations account for only about 1.3% of the total asset value of the broadcasting industry. Keep in mind that people of color now constitute nearly 27% of the U.S. population.

Why should the federal government promote minority broadcast ownership?

First, minority ownership promotes competition, because an integrated industry serves the public better and competes more effectively than a segregated industry.

Second, minority ownership promotes diversity. This should be obvious. If you hold up a copy of the Michigan Chronicle, you will notice that it covers different issues, and covers issues

differently, than the Detroit News or the Detroit Free Press. Research studies -- annotated at length in our Comments -- have documented that minority owned broadcast stations air much more racially diverse programming than do other stations. No one needs to be reminded that most nonminority owned media far too seldom include people of color as sources in news stories, or as positive characters in situation comedies or dramas; or that nonminority owned media routinely spread racial stereotypes on such subjects as crime, immigration, and civil rights.

So -- what is the FCC doing to promote minority ownership?

The tax certificate policy, adopted as part of the 1978 Minority Ownership Policy Statement, gave a capital gains tax deferral to anyone who sold a broadcast station or cable system to minorities. Congress repealed the policy in 1995 amid allegations that nonminorities were setting up "sham" or "front" companies to take advantage of the policy. Senator John McCain has introduced the Telecommunications Ownership Diversification Act of 2003, an excellent bill which if enacted would restore much of the former tax certificate policy.

The distress sale policy allows a company, at risk for losing its broadcast licenses for gross misconduct, to avoid the probable loss of its entire investment if it sells its stations to minorities for 75% or less of their fair market value. This policy is ineffectual now, since the FCC almost never finds that a broadcaster does anything so egregious that its license is in jeopardy. There have been only three distress sales since 1990.

Last year, by a unanimous vote, the FCC adopted new broadcast and cable equal employment opportunity (EEO) regulations, partly because it recognized that experience in broadcast and cable operations is essential if one is to graduate into ownership. Although the cable industry, the television networks and many large broadcast companies support these modest new outreach and recruitment rules, every state broadcast association except the one in Minnesota continues to oppose and seeks to overturn the new EEO regulations.

Finally, the FCC plans to auction off the few remaining FM broadcast licenses using a system of "bidding credits" that give a leg up to new entrants, a category that includes most minorities. Unfortunately, in most large cities, including Detroit, all of the AM, FM and television spectrum is already occupied. In these cities, the only way to get a broadcast license is to buy a station from an incumbent, who may have gotten the license for free at a time when people of color had no chance of winning a license.

Let's turn next to the business at hand. What is the FCC omnibus broadcast ownership proceeding about?

The FCC plans to dramatically change the rules governing how many local and national broadcast outlets one company can own; these are called the "structural ownership rules." As we will hear today, our democracy, voter participation, public information, civic discourse and culture are profoundly influenced by rules that govern who is allowed how much of an ownership stake in the most influential industry in the world.

On June 2 the FCC will decide these six questions:

1. Can one television network buy another television network -- for example, can NBC own ABC?
2. How much of the national television audience can one company reach through stations it owns?
3. Can a newspaper merge with a television station in the newspaper's home community?
4. How many independent media "voices" must a community have before a television station can buy radio stations in the same community?
5. What defines the geographic "market" within which a company can own only a limited number of radio stations (for example, in Detroit the limit is eight stations); and
6. How many independent media "voices" must a community have before two television stations in the community can merge?

The FCC began this rulemaking at the direction of Congress, which in the 1996 Telecommunications Act required the FCC to hold a proceeding like this every two years and "eliminate or modify" any rule found not to be "necessary in the public interest." Obviously, this legislation places the burden of justifying a regulation on the proponents of the rule. The FCC has tentatively found that the explosion of new media, such as internet web sites and satellite TV channels, has diminished the need for limitations on how many over-the-air stations a company can own. Some opponents of the rules point out that the most successful national media outlets, even internet sites, are often owned by the same companies, and that independent sources of local news are actually in decline in most cities.

Other opponents point out that media consolidation, if not implemented carefully, could further jeopardize minority ownership. As one of the 179 specific questions put out for public comment in this rulemaking, the FCC has asked "whether" minority ownership should be an objective of the structural ownership rules, and, if so, can minority ownership be advanced by race-neutral means. The FCC is concerned that Adarand and other cases limit the government's ability to use race-conscious measures to remedy the effects of past discrimination or -- as we will soon learn in the Gratz and Grutter cases involving the University of Michigan -- whether race-conscious programs can be used to promote diversity.

If -- as is likely -- the FCC or the courts relax the structural ownership regulations, can the new rules be implemented in a manner that does not damage, and perhaps even advances, minority ownership?

The answer is "maybe." This proceeding is not only about "whether" but "how" the Commission deregulates. For example, the Minority Media and Telecommunications Council and 16 other national organizations have urged the Commission, if it deregulates, to do so gradually, in stages, over time, so that if it observes that the new rules are endangering diversity, competition, localism or minority ownership, it can apply the brakes.

MMTC has also urged the FCC to create two new classes of FM stations throughout the country and provide minorities with every opportunity to secure new FM station licenses.

Further, MMTC has urged the FCC to adopt and enforce a flat prohibition on race and gender discrimination in the sale of a broadcast station, thus making "equal transactional opportunity" the law of the land. Too often, minorities hear of stations for sale only after someone else has been given the opportunity to buy them. If investors knew that minorities will enjoy an equal opportunity to bid on broadcast properties, much more capital will flow to minority owned companies. Already, smart investors realize that most minority owned broadcasters are extraordinarily capable -- because they've had to be. As station owners, minorities have faced far more obstacles than other broadcasters, including extensive and well documented discrimination by advertisers. In order to succeed, no minority broadcaster can be just "average." Only extraordinary minority broadcasters like Radio One, Granite, and Inner City Broadcasting, have survived.

In anticipation of the FCC's new rules, deals are already being struck to further consolidate the industry. Thus, we have no time to waste. In the coming hours, let's try to get all pertinent statistics and anecdotal evidence into the record, and let's be as thoughtful as we can in suggesting how the FCC can use its enormous power to strike a blow in favor of diversity and inclusion.

Thank you.

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