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FCC Adopts Small Business Preference to Enhance Broadcast Ownership Diversity

By Melodie A. Virtue

In an effort to expand broadcast ownership diversity, the FCC relaxed some of its rules for new entrants and small businesses, and proposed further revisions that might more directly help minority organizations and women. Entities eligible to take advantage of the rule changes are small businesses as defined by the Small Business Administration ("SBA"). Eligible TV broadcast stations are those with no more than \$13 million in annual receipts. Eligible radio broadcast entities must have no more than \$6.5 million in annual revenues. The FCC has requested comments in a further rulemaking proceeding about how to define an Eligible Entity to assist socially and economically disadvantaged groups. *Promoting Diversification of Ownership in the Broadcasting Services*, FCC 07-217, released March 5, 2008. Although the new and proposed rules are directed toward investment in commercial stations, they may create opportunities for those interested in acquiring stations that will be used for a noncommercial purpose.

Opportunities for Eligible Entities

Eligible Entities receive special treatment under a variety of Commission rules and policies.

Expiring Construction Permits: Broadcasters with permits about to expire may sell them to Eligible Entities rather than let the permits expire. If permits are assigned to an Eligible Entity, the Eligible Entity will receive the greater of the time remaining on the original construction permit or 18 months.

Equity Debt Plus ("EDP") Attribution Standard. The EDP rule attributes an investor's media interests to the station licensee if the investor is either a program supplier or same market broadcaster and holds an investment of more than 33% in the station's total assets (equity plus debt). To promote investment in Eligible Entities, the FCC changed its EDP threshold in Eligible Entities to allow the investor's interests to be non-attributable where:

- (1) Equity plus debt of the interest holder is less than 50 percent, or
- (2) Debt of the interest holder in the Eligible Entity remains less than 80 percent of the asset value of the station being acquired by the Eligible Entity and the investor does not hold any equity interest, option, or promise to acquire an equity interest in the Eligible Entity.

The same elevated EDP limits for Eligible Entities apply in determining eligibility for bidding credits in auctions for new broadcast permits.

Distress Sale Policy. The Commission's distress sale policy allowed licensees designated for a revocation hearing to sell the station to a minority-controlled entity at a price substantially below

fair market value. The Supreme Court's decision in *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995), cast doubt on the constitutionality of continuing the distress sale policy based on the racial classification of the buyer. The FCC, therefore, removed the restriction that stations be sold to minorities and will now permit a distress sale of a broadcast station to an Eligible Entity.

Control Test

For an entity to be eligible for the new opportunities, the Eligible Entity must hold:

- (1) 30 percent or more of the equity ownership and more than 50 percent voting power of the entity that will hold the broadcast license; or
- (2) 15 percent or more of the equity ownership and more than 50 percent voting power of the entity that will hold the broadcast license, provided that no other person owns or controls more than 25 percent of the equity interests; or
- (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast license is a publicly-traded company.

Anti-Discrimination Dictates

The Commission adopted various rules designed to prevent discrimination and increase ownership transparency.

Discrimination in Broadcast Transactions. The Commission explicitly bans discrimination in broadcast transactions. No qualified person or entity may be discriminated against on the basis of race, color, religion, national origin or sex in the sale of a broadcast station.

Ownership Fraud. The FCC adopted a zero tolerance policy for ownership fraud. It promises to fast track claims of ownership fraud, and will try to resolve them in 90 days. The Commission will protect the confidentiality of whistleblowers to the extent permitted under federal law.

No Urban/Hispanic Dictates in Advertising Contracts. In renewal applications, broadcasters must certify that their advertising sales contracts do not discriminate based on race or gender and that they contain nondiscrimination clauses. The FCC's action is designed to outlaw so-called "no urban dictates" and "no Hispanic dictates."

Incentive Programs

The Commission will take the following actions to stimulate investment in broadcast properties and track ownership by women and minorities:

- Conduct longitudinal studies of female and minority ownership data to track ownership trends;
- Work with the SBA to educate local and regional banks to make loans for broadcast or telecommunications-related transactions under the SBA's 7(a) or 504 programs;
- Provide priority to an entity that finances or incubates an Eligible Entity if it files for a duopoly simultaneously with a non-eligible entity in a market that can support only one additional duopoly;

- Consider requests to extend divestiture deadlines in mergers where applicants have actively sought bids for divested properties from Eligible Entities as long as they either sell a given property to an Eligible Entity within the extended deadline or have the station placed in an irrevocable trust for sale by an independent trustee to an Eligible Entity;
- Expand the exception to the transfer of grandfathered radio clusters to permit the assignment or transfer of grandfathered radio station combinations intact to any buyer, not just an Eligible Entity, so long as the buyer files an application to assign the excess stations to an Eligible Entity or to an irrevocable divestiture trust which will assign the excess stations to an Eligible Entity within 12 months after the purchase of the grandfathered cluster; and
- Convene an access-to-capital conference in New York City and create a guidebook on diversity that will explore what companies can do to promote diversity in ownership and contracting.

Proposals under Consideration

The Commission adopted a further notice of proposed rulemaking to examine the following issues raised in the rulemaking, and seeks comment on:

- Narrowing the definition of Eligible Entity to apply to socially and economically disadvantaged businesses. Businesses might be presumed to qualify if they can show that they are disadvantaged and are owned or controlled by African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans and Native Americans. Alternatively, the FCC might implement a "full-file," individualized review that takes into account factors including race or ethnicity, similar to those conducted by the Michigan, California and Texas university admission systems;
- Permitting FM licensees broadcasting in HD to assign the right to operate one HD stream to a socially or economically disadvantaged business, and considering how this right might impact ownership restrictions;
- Allowing the holder of an AM expanded band license to sell one of its paired licenses at 75% of the station's fair market value to an Eligible Entity and to extend the dual operating period authorization and the temporary exemption from attribution under the multiple ownership rule. (That way, licensees would be permitted to sell one of the paired AM stations to a qualifying small business or, if the licensee itself were a small business, it would be permitted to retain both AM licenses);
- Modifying its ownership report form to obtain more accurate information on the racial and gender identity of licensees and imposing penalties on licensees that file inaccurate information;
- Trying a trial incubator program that would allow a group owner to exceed the local ownership cap in a large market if it helped to incubate an Eligible Entity-controlled station;
- Allowing an FM station to vacate a community of license that has no other audio service if the FM station underwrites the cost of licensing, construction, and operation for one year for a new local service LPFM station licensed to the vacated community;
- Granting must-carry status for Class A television stations;

