Before the
Federal Communications Commission
Washington, D.C. 20544

In the Matter of	)	
	)	
Review of Foreign Ownership Policies for	)	
Common Carrier and Aeronautical Radio	)	IB Docket No. 11-133
Licensees under Section 310(b)(4) of the	)	
Communications Act of 1934, as Amended	)	

COMMENTS OF THE MINORITY MEDIA
<u>AND TELECOMMUNICATIONS COUNCIL</u>

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TABLE OF CONTENTS

I. THE COMMISSION SHOULD NOT RESTRICT SECTION 310(b)(4) FROM APPLYING TO FOREIGN BROADCAST INVESTMENT 1

a. The Commission's central premise justifying its policy of restricting foreign ownership of broadcast stations (national security and licensee control) no longer applies……..………….…...... 2

b. The Commission could advance minority broadcast ownership and reciprocity for U.S. investment in overseas broadcast markets by relaxing its foreign broadcast ownership policy...………………………….…………………………………….....5

CONCLUSION……………………………………………………………………….....… 7

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COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

The Minority Media and Telecommunications Council (MMTC) respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking,[1] to encourage the Commission to relax its policies and procedures[2] that restrict foreign ownership of broadcast licenses and to treat at least passive broadcast ownership in a manner that is consistent with foreign ownership of common carrier and aeronautical radio licenses.

I. THE COMMISSION SHOULD NOT RESTRICT SECTION 310(b)(4) FROM APPLYING TO FOREIGN INVESTMENT IN BROADCAST FACILITIES

The Commission should reevaluate its policy of restricting foreign investment in broadcast facilities to adapt to changed circumstances. The current policy, which the Commission continues to apply with its 1912 premises and justifications,[3] should be reevaluated so it is consistent with the Commission's desire to foster minority participation in broadcasting

[1] See Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended, 47 U.S.C. Section 310(b)(4), 76 FR 65472 (2011) ("Section 310(b)(4) NPRM").

[2] The Commission specifically states that, "[t]his NPRM does not address our policies with respect to the application of section 310(b)(4) to broadcast licensees. The Commission historically has recognized different policy concerns for foreign ownership in the U.S. parents of broadcast licensees." However, the Commission did not explain the different policy concerns that are the basis for the continuation of this disparate treatment. See id. at note 3.

[3] This policy has remained virtually unchanged since its adoption.

and to increase diversity of viewpoints in that medium.[4] Relaxing the Commission's foreign ownership policies will help reach these goals by increasing access to capital,[5] by not only providing new funding options for minority broadcast entrepreneurs, but also giving all U.S. broadcasters the opportunity to increase their investments in foreign broadcast outlets.[6]

a. The Commission's central premise justifying its policy of restricting foreign ownership of broadcast facilities (national security and licensee control) no longer applies.

The foreign ownership restrictions in Section 310(b)(4) of the Communications Act are outdated in light of a sea change in communications technology and the advent of a global economy. Congress enacted the predecessor to Section 310(b)(4) during the tumultuous climate of the early twentieth century,[7] when the U.S. was fighting the global spread of anti-

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[4] For example, while addressing a gathering of the National Association of Black Owned Broadcasters in September 2009, Chairman Julius Genachowski noted the Commission was concerned about a lack of minority- and female-owned full-power broadcast outlets. See "Genachowski, McDowell: More should be done to promote minority, female broadcast ownership", Broadcast Engineering, available at http://broadcastengineering.com/news/genachowski-mcdowell-promote-minority-female-broadcast-ownership-0930/ (last visited Nov. 30, 2011). Further, the Commission has recently re-chartered its Advisory Committee for Diversity in the Digital Age, whose mission is to "make recommendations to the FCC regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries." See Advisory Committee for Diversity in the Digital Age, available at http://www.fcc.gov/encyclopedia/advisory-committee-diversity-digital-age (last visited Nov. 30, 2011).

[5] Infra at 5.

[6] In 2008, MMTC, joined by 28 other national organizations, sought reconsideration of the Commission's denial of a Petition to relax the policy; that petition remains pending. See Petition for Partial Reconsideration of 29 Organizations, In the Matter of Promoting Diversification of Ownership In the Broadcasting Services, MB Docket No. 07-294, filed June 16, 2008, available at http://mmtconline.org/lp-pdf/DCS-Diversity-Recon-061608.pdf (last visited Nov. 28, 2011).

[7] Beginning in the Radio Act of 1927, the Commission has expressed that the impetus for imposing restrictions on foreign broadcast ownership was to quell the spread of anti-American propaganda. In 1912, when these policies originated, there was a genuine risk of German dominance of a broadcasting industry in its infancy. "Since communications historians have not investigated foreign ownership rules, it is necessary to turn to legal scholars who participated in the debate about revising the regulations for the Telecommunications Act of 1996. Members of the legal profession and the Federal Communications Commission (FCC) generally accept that the main national security justification behind the passage of Section 310 was a concern with propaganda." Rita Zajacz, "Liberating American communications: foreign ownership regulations from the Radio Act of 1912 to the Radio Act of 1927", p. 1, available at

Americanism.[8] Today, however, social media, enabled by the Internet, have substantially changed the way organizations, communities and individuals communicate, eclipsing broadcastings' ability to dominate the marketplace of viewpoints relating to national security and myriad other topics and issues affecting daily life.[9] Moreover, when Congress first enacted foreign ownership restrictions, only a handful of radio stations were licensed. At that time Congress was concerned that foreign investments would influence U.S. security. Expanding on this concept, the FCC later cited propaganda concerns as justification for the restrictions. Today, there are thousands of radio and full power television stations, LPTVs, and other mass media such as cable. Indeed, U.S. media are the strongest dominating media in the world.[10] There is a much greater likelihood of American ideals and viewpoints impacting those living abroad, than the converse.[11] In fact, an examination of the cable industry shows that the absence of foreign ownership restrictions have not posed any danger whatsoever of foreign domination of

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http://findarticles.com/p/articles/mi_m6836/is_2_48/ai_n25092547/pg_12/?tag=content;col1 (last visited November 8, 2011). See also Notice of Proposed Rulemaking in the Matter of Market Entry and Regulation of Foreign-Affiliated Entities, 10 FCC Rcd 4844 (1995); "Inventing American broadcasting, 1899-1922", S. J. Douglas, Johns Hopkins University Press; "Foreign investment in American telecommunications", J. G. Sidak, University of Chicago Press; and "Foreign ownership restrictions under Section 310(b) of the Telecommunications Act of 1996", V. Paladini, Boston University International Law Journal 14(2), 341-373.

[8] As the most efficient and pervasive means of addressing the public, regulating foreign access to U.S. broadcasting was imperative in order to protect national interests.

[9] It is difficult to envision foreign investors – especially WTO members – endangering our national security through their ownership stakes in broadcast stations.

[10] See "World Falls for American Media, Even as It Sours on America", Tim Arango, New York Times, available at http://www.nytimes.com/2008/12/01/business/media/01soft.html (last visited Nov. 30, 2011).

[11] Voice of America and other American international broadcasters now reach 187 million people every week, an increase of 22 million from 2010 and an all-time record number of listeners and viewers. For example, 2011 data shows that three-quarters of the entire country watches or listens to American broadcasts. See "U.S. International Broadcasting Reaching Record Audience Accessing Impact Questioned," Adam Clayton Powell III, U.S.C. Center on Public Democracy at the Annenberg School, available at http://uscpublicdiplomacy.org/index.php/newswire/cpdblog_detail/us_international_broadcasting_reaching_record_audience_assessing_impact_q/ (last visited Nov. 30, 2011).

that industry, and if the foreign ownership policies are relaxed the same would certainly be true of the broadcast industry.

There is no principled reason to disallow foreign investment in U.S. broadcasting but permit foreign investment in wireline carriers and other non-broadcast facilities. As noted, in the realm of cable television, another medium of mass communications, there are no foreign ownership restrictions and there is absolutely no evidence that there have been any adverse consequences where systems (or cable stations) are owned or operated by foreign entities. Nor has the Commission expressed any concerns where radio stations, full power television stations, Class As and LPTVs are being programmed by non-citizens under LMAs or similar arrangements. Arguably, a foreign investor would have a greater ability to negatively influence US security by having a controlling stake in T-Mobile and by investing in U.S. telecommunications infrastructure than by owning more than 25% of two local broadcast channels in Maryland. A foreign investor's passive investment in a U.S. broadcast channel is no danger to the nation's security because Section 706 of the Communications Act (and other federal laws) provide ample protection..

Since there is no underlying justification for the disparate treatment of foreign ownership of broadcast facilities under subsection (b)(4), it is unlikely that continued strict adherence to this policy would, in the present circumstances, be deemed either rational or in the public interest. . The NPRM does not suggest that adjusting the policy –and, of course, maintaining regulatory oversight in all instances--would disserve the public interest.[12] If the Commission raised the percentage of foreign ownership limits even modestly, as MMTC has recommended, the agency would still retain vast powers to protect against any conceivable adverse affect on U.S.

[12] See NPRM, footnote 3.

broadcasting, for example by means of the World Trade Organization's TRIPS agreement procedures.[13] Therefore, Commission policy restricting foreign investment in broadcast stations should be relaxed; that policy is outdated and is no longer in the public interest.[14]

b. The Commission could advance minority broadcast ownership and reciprocity for U.S. investment in overseas broadcast markets by relaxing its foreign broadcast ownership policy.

Relaxation of the foreign ownership policy would provide struggling broadcasters, many of whom are minority broadcasters, with greater access to capital. The FCC has long recognized that access to capital is a primary barrier to minority and women broadcast ownership.[15] Relaxation of foreign ownership policies would serve to increase diversity in broadcast ownership by providing new sources of capital for minorities and women. For example, the number of Spanish language broadcasters has been steadily declining over the past few years due

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[13] See "Overview: TRIPS Agreement," World Trade Organization, available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Nov. 30, 2011).

[14] If a policy's underlying premise is no longer valid, the policy has to be either revised or a new rationale is needed for its continued use. As the D.C. Circuit explained in Geller v. FCC, "[w]hat we have, then, are cable television rules that may or may not presently square with the public interest. Even assuming that the rules in question initially were justified by the aid the Commission expected them to afford to enactment of the copyright legislation--a question we do not decide--it is plain that that justification has long since evaporated. The Commission's general rulemaking power is expressly confined to promulgation of regulations that serve the public interest; it must place the public interest above private interests in carrying out its duties. And, as the Second Circuit has so well put it, "the Commission may reach compromises . . . but it may not simply compromise between the interests of different broadcasting groups and gloss over the more fundamental public interest. Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation. We hold that the Commission is statutorily bound to determine whether that linkage now exists." 610 F.2d 973, 980 (D.C. Cir. 1979).

[15] See Prepared Remarks of FCC Chairman Julius Genachowski, Minority Media and Telecom Council Access to Capital and Telecommunications Conference (July 20, 2010), available at http://www.fcc.gov/document/prepared-remarks-fcc-chairman-julius-genachowski-minority-media-and-telecom-council-access- (last visited Nov. 08, 2011). See also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC2d 849, 861 ¶23 (1982) (As a result of this Policy Statement, the Commission began to consider: "(1) Issuing tax certificates and authorizing distress sales in transfers to limited partnerships where a minority general partner (or partners) owns more [than] 20 percent of the broadcasting entity; and (2) Issuing tax certificates to shareholders upon divestiture of their interest in minority controlled broadcasting entities where divestiture furthers minority ownership[.]"

to the lack of capital investment. The most recent studies show that minority ownership was only approximately 7.24% in commercial radio and 3.15% in full power television.[16] By relaxing foreign broadcast investment policies, while maintaining the present policy requirement for foreign investors holding a non-controlling interest, U.S. broadcasters would have access to new sources of capital that are not available to them under the current regulatory paradigm.

Further, potential reciprocity resulting from the relaxation of 310(b)(4) policies would provide American media companies new choices to expand overseas. Presently, only Clear Channel and Emmis among U.S. radio companies have overseas stations. Offering reciprocal ownership will improve the likelihood that foreign nations will increase the ability of U.S. investors to have ownership rights in overseas broadcast entities. U.S. broadcasters are interested in expanding overseas; revising the Commission's policies as provided in these comments will allow U.S. companies the opportunity to expand internationally and grow.[17]

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[16] Minority ownership is critical to diversity in the broadcast industry due to the demonstrated nexus between minority ownership and diverse programming, and the consumption patterns of minority communities. With such dismal numbers, there is no way that there can be a broad and varied expression of views and beliefs presented in the media. It is imperative that the broadcasting industry reflects the nation's demography. See generally Comments of the Diversity and Competition Supporters, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182 (July 12, 2010), pp. 3-9, available at http://mmtconline.org/lp-pdf/MMTC%20Foreign%20Ownership%20Reply%20072610.pdf (last visited Oct. 17, 2011); see also Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest, Catherine Sandoval et al. (Nov. 2, 2009), pp. 4, 20-24, available at http://mmtconline.org/lp-pdf/Minority_Commercial_Radio_Broadcasters_Sandoval%20_MMTC_2009_final_report.pdf (last visited Nov. 30, 2011); A Year After Obama's Election Blacks Upbeat about Black Progress, Prospects, Pew Research Center (Jan. 12, 2010), p. 60, available at http://pewsocialtrends.org/assets/pdf/blacks-upbeat-about-blackprogress-prospects.pdf (last visited Nov. 28, 2011).

[17] For example, in October 2011, the Walt Disney Company announced that it had purchased a 40% share in Russia's Seven TV station, with plans to introduce a nationally broadcast version of the Disney Channel. See "Disney Channel to Be Introduced in Russia", Brooke Barnes, New York Times, available at http://mediadecoder.blogs.nytimes.com/2011/10/27/disney-channel-to-be-introduced-in-russia/ (last visited Nov. 30, 2011).

CONCLUSION

The Commission can take many steps to reform its restriction on foreign investment in broadcasting and, thereby bridge the digital divide and increase minority ownership and participation in the broadcasting industry. There has been a decline in minority ownership and participation in broadcasting due mainly to the unavailability of capital. Relaxing the foreign ownership restrictions is the most significant and efficient step that the Commission could take to remedy this. A vibrant minority broadcast industry will increase employment opportunities for minorities and add to diversity of viewpoints available to the American public.

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