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

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Federal Communications Commission
Office of the Secretary

In the Matter of:	
Petition for Rulemaking of the Minority Media and Telecommunications Council	RM-_______
To Facilitate the Entry of Small Businesses Into Local Radio Markets	

PETITION FOR RULEMAKING

Despite the Commission's efforts, small businesses continue to suffer dramatic under-representation among broadcast owners.[1] This problem is not new: the Commission has taken steps for many years toward the goal of facilitating acquisition of broadcast properties by small businesses.[2] These efforts, however, have not been sufficiently effective in counteracting the barriers that have prevented small businesses from becoming broadcasters.

[1] Minority-owned businesses fare similarly poorly: by Free Press' estimate, broadcast ownership by women stands at about 6% of all full-power commercial radio stations, even though women comprise 51% of the U.S. population. Latino ownership is at 2.9% although Latinos comprise the nation's largest ethnic minority group, accounting for 15% of the population. African-Americans, which account for 13% of the U.S. population, own just 3.4% of full-power commercial radio stations, and people of Asian descent own less than 1% of such stations even though they make up 4% of the U.S. population, S. Derek Turner, "Off the Dial: Female and Minority Radio Station Ownership in the United States," Free Press (June 2007) (available at http://www.stopbigmedia.com/files/off_the_dial.pdf). *See also* S. Derek Turner & Mark Cooper, "Out of the Picture: Minority & Female TV Station Ownership in the United States," Free Press (Oct. 2006) (available at http://www.stopbigmedia.com/files/out_of_the_picture.pdf) (reporting similarly troubling statistics for commercial television station ownership).

[2] *See 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules*, 18 FCC Rcd. 13620, 13634-35 (2003) ("2002 Biennial") (describing the Commission's 1995 Notice of Proposed Rulemaking to "explore ways to provide minorities and women with

In this Petition for Rulemaking, the Minority Media and Telecommunications Council ("MMTC") respectfully requests that the Commission make a small but important change to its existing policy concerning the transfer of radio stations to small businesses that will effectively enhance opportunities for small businesses to participate in broadcast station ownership and operation. Specifically, MMTC proposes that the Commission should allow a grandfathered cluster of radio stations that otherwise exceeds the applicable ownership cap to be transferred in its entirety to any third party – not just small business entities – subject to a condition that the third party transfer the stations exceeding the cap within 12 months to a small business. This approach would create increased opportunities for small businesses by providing extra time for a small business entrant to raise the capital necessary to make a competitive bid on a radio station. This modest change to the current rule would help foster the goals of diversity, competition and localism.

I. IN 2002 THE COMMISSION ADOPTED PROCEDURES THAT SOUGHT TO FACILITATE TRANSFER OF RADIO STATIONS TO SMALL BUSINESSES.

In the Telecommunications Act of 1996, Congress instructed the Commission to take steps to eliminate "market entry barriers for entrepreneurs and other small businesses."[3] In so doing, Congress directed the Commission to make efforts to promote policies "favoring the diversity of media voices [and] vigorous economic competition."[4] Since the 1996 Act was

greater opportunities to enter the mass media industry," its 1996 Notice of Inquiry "seeking comments on the nature of market entry barriers for small businesses," and its public forums to identify barriers to competition).

[3] 47 U.S.C. § 257(a).

[4] 47 U.S.C. § 257(b).

adopted, the Commission has reported periodically to Congress on the steps it has taken in furtherance of that mandate.[5]

One of the major steps reported to Congress was that, in its 2002 Biennial Ownership Review, the Commission modified its standard for permissible radio clusters in an effort to reduce the number of media outlets owned by a single entity in a given market.[6] Among other changes, the Commission altered its radio market definition standard in an effort to more accurately count a market's radio stations in determining compliance with the relevant ownership cap.

The change in radio market definition created many circumstances in which existing radio combinations did not comply with the new rules. The Commission grandfathered existing radio clusters in order to prevent broadcasters from being required to immediately sell off stations to comply with the modified ownership limit. However, the Commission generally prohibited licensees from transferring clusters where the transferee's holdings would then violate the new rules.[7]

To encourage the sale of radio stations to small businesses, the Commission created an exception to this general prohibition pursuant to which an owner could transfer a grandfathered "above cap" combination – intact – to a small business. The small business could "sell existing grandfathered combinations without restriction."[8] The Commission found that this exception was warranted because it would likely facilitate the continued availability of media properties to small businesses. The Commission explained:

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[5] *See, e.g., Section 257 Triennial Report to Congress*, 19 FCC Rcd. 3034 (2004).

[6] *2002 Biennial* at ¶ 248-286.

[7] *Id.* at ¶ 487.

[8] *2002 Biennial* at ¶ 488. *See also* 47 C.F.R. § 73.3555 n.4.

> We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities . . . outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.[9]

Like other changes made to the ownership rules in the *2002 Biennial*, the transfer-intact exception supported the Commission's core goals of preserving diversity,[10] preserving competition,[11] and fostering localism.[12] The transfer-intact exception had the potential to bring to local markets new entrants who offered diverse perspectives and created competition by presenting innovative new programming and community services.

II. THE 2002 POLICY HAS NOT BEEN SUFFICIENTLY EFFECTIVE, AND SMALL BUSINESS RADIO OWNERSHIP IS DECLINING.

Despite its promise to promote small business ownership, the transfer-intact exception adopted in the *2002 Biennial* has not yet resulted in a closed transaction because small business new entrants typically cannot obtain the financing necessary to buy an entire cluster of radio stations on the time schedule at which most large broadcast transactions proceed. It is well-established that small businesses – and, in particular, minority small businesses – lack the rapid access to substantial capital that their larger counterparts enjoy. First, larger companies enjoy more established relationships with private equity and other investors who are generally more willing to provide capital for their acquisition of a broadcast property, particularly because

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[9] *2002 Biennial* at ¶ 51.

[10] *Id.* at ¶¶ 18-52.

[11] *Id.* at ¶¶ 53-72.

[12] *Id.* at ¶¶ 73-79.

the larger company may have a more established history than a small business. Second, minorities and women and other small businesses who seek capital generally obtain less money less easily than their mainstream industry counterparts. The U.S. Department of Justice, for example, has stated that "[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than non minority applicants with identical collateral and borrowing credentials."[13]

As a result of these existing hurdles, even where a small business would theoretically be able to obtain the capital necessary to acquire broadcast properties, it takes longer to do so and often results in less secure financing. Because radio station sellers are often unwilling to wait to see if a small business can collect the necessary funding to acquire the entire cluster, rather than take advantage of the transfer-intact provision, sellers generally choose to transfer the permitted portion of the cluster to any potential buyer and to spin off the excess stations separately.[14]

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[13] *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26057-58 (May 23, 1996). *See also* Leonard M. Baynes, "Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing," 57 Rutgers L. Rev. 235 (2004) (surveying the extensive evidence that minority-owned small businesses overwhelmingly lack the same access to capital that white-owned and more established businesses enjoy).

[14] Commissioner Adelstein anticipated this situation in remarks accompanying the *2002 Biennial*, in which he observed, "Small businesses will encounter great difficulty in raising the capital necessary to buy expensive, large clusters, if they ever even come on the market at all. This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spin-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool." *2002 Biennial*, Stmt. of Cmr. Adelstein, at 23.

III. THE COMMISSION SHOULD FACILITATE TRANSFERS TO SMALL BUSINESSES AND BREAK-UP OF GRANDFATHERED CLUSTERS BY (1) ALLOWING THE SALE OF CLUSTERS TO A BUYER WHO COMMITS TO RESELL THE EXCESS STATIONS TO A SMALL BUSINESS AND (2) GRANTING THE SMALL BUSINESS 12 MONTHS TO SECURE FINANCING FOR THE PURCHASE.

The Commission's effort to further competition, diversity, and localism in radio markets through the adoption of the transfer-intact exception was laudable. Those goals could more effectively be promoted, however, with only a modest change to its existing transfer-intact policy, which would provide needed flexibility to small businesses.

MMTC proposes that the Commission should allow the sale of grandfathered radio clusters intact to *any* buyer, subject to the condition that the buyer file an application to transfer the excess stations to a small business buyer within 12 months after consummation of the cluster's purchase. When the application to transfer the intact cluster is filed, the buyer should be required to certify its intention to come into compliance within a year and outline the steps that it will take to market the cluster or specific stations exceeding the ownership cap to small businesses, including minorities and women.[15]

This policy would redress the core problem with the existing rule: small businesses are less likely to have rapid access to sufficient capital during the short period of time when the broadcast station seller is soliciting bids. Under this approach, the larger entity could

[15] *See Review of the Commission's Broadcast & Cable Equal Employment Opportunity Rules & Policies*, 17 FCC Rcd. 24018, ¶ 114 (2002) (encouraging stations to engage in outreach to organizations "whose membership includes substantial participation of women and minorities" as a part of broad recruitment). *Cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1*, --- S.Ct. ---, 2007 WL 1836531, *43, *46 (rel. June 28, 2007) (Kennedy, J., concurring in part) (observing that "[d]iversity . . . is a compelling educational goal a school district may pursue" and reaffirming the Court's 2003 holding that diversity in higher education can be a compelling governmental interest).

purchase the entire "above cap" cluster at the outset, and a small business would have the additional 12 month period, if necessary, to raise the capital to purchase the excess stations.

Thus, this approach would promote the public policy goal of promoting small business investment in broadcasting by providing small businesses with sufficient time and flexibility to collect the capital necessary to make a competitive offer to the seller. As demonstrated below, the Commission's three media ownership policy goals of diversity, competition and localism are all met by this modest change to the radio rule.

A. Diversity

Increasing eligible entities' ability to procure financing in order to acquire radio stations would promote diversity of ownership in the radio industry. The *2002 Biennial* found that sales of grandfathered combinations to such entities serves the diversity goal,[16] and the modest modifications to the transfer-intact exception discussed above would better effectuate the Commission's policy in this area. As the Commission has already found, promoting and encouraging opportunities for small businesses in radio "enhances viewpoint diversity and the public interest" because such entrepreneurs "seek[] to meet a market demand or provide programming to underserved communities."[17]

The Supreme Court has long held that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[18] By making the incremental change to the ownership rules proposed here, the Commission would dramatically increase opportunities for small businesses to become broadcasters in markets

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[16] *2002 Biennial* at ¶ 487.

[17] *Id.* at ¶ 306.

[18] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 522, 633-64 (1984) (internal quotations omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality op.)).

throughout the country. By providing these opportunities, the Commission will expand the pool of broadcasters serving local communities, thereby providing the public with access to programming provided by broadcasters with a wide variety of viewpoints.

B. Competition

High barriers to entry in the radio market adversely affect the ability of small businesses to acquire stations. As the *2002 Biennial* noted, "[r]adio broadcasting is a closed entry market, [and t]he closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio broadcasting."[19] By improving new entrants' potential to secure financing with which to acquire stations, the approach will expand the pool of potential competitors and thereby promote competition with established incumbent radio broadcasters. In addition, as stated above, small businesses, which often include businesses owned by women and minorities, will seek to serve presently underserved communities by gearing their programming toward underrepresented parts of the radio market. This new competition will breed innovation in programming and create incentives for both new entrants and incumbents to continually increase program quality. Both the diversity and competition goals are thereby served by creating opportunities for eligible entities.

C. Localism

The Commission's localism goal "stems from [its] interest in ensuring that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed."[20] Because radio can reach specific demographic groups in a given local community more easily than other forms of media, it serves localism for

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[19] *2002 Biennial* at ¶ 288.

[20] *Id.* ¶ 302.

radio licenses to be distributed among a range of licensees of different types and sizes. Granting eligible entities an additional 12 months to secure financing will increase radio ownership among those entities, which will in turn create a more representative and responsive group of radio licensees in local communities.

D. Additional Considerations

Although small businesses are the intended beneficiary of this approach, sellers of radio stations and initial purchasers of the entire cluster would also have incentives to utilize this new approach. A prospective radio seller might prefer this scenario because the sale of an entire cluster could be completed more quickly and in one transaction, thereby allowing the seller to avoid multiple transactions and related costs, risks, and delays. Similarly, this approach would offer certain benefits to the initial buyer of a cluster, making it more likely that large companies would utilize this new approach for the benefit of small businesses. For example, by purchasing the entire cluster subject to the 12-month sale requirement, a large company could choose which stations in the cluster it wants to retain, and the company would have extra time to make a more informed decision as to which radio stations it wants to transfer to a small business owner. Thus, all parties are potential beneficiaries of this approach and would likely frequently utilize the rule modification for the ultimate benefit of small businesses.

MMTC proposes that the Commission should agree to waive the 12-month sale requirement only in the event of certain "acts of God," such as natural disasters, catastrophes or terrorist acts that devalue a station to such an extent that it is not possible to sell it within the established timeframe. Licensees who fail to transfer excess stations to a qualified small business in a timely manner would be required to place the excess stations into an irrevocable trust with instructions to the trustee to sell the stations to a small business entity.

Unlike the existing policy that paradoxically discourages small business station ownership, this approach would increase opportunities for the timely transfer of covered stations to small businesses. Finally, there is no downside to the proposal. It would compromise no public policy and would not impose any administrative or other burdens.

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The Commission has long been committed to promoting competition and diversity in media markets, and it acted in 2002 to promote these goals. Although the 2002 policy has not proven to be effective, the Commission could make it effective by modifying its rules to permit intact transfers of grandfathered clusters, subject to a 12-month spin-off requirement to small businesses. By encouraging transfers to small businesses and providing potential small business buyers with the time to obtain financing, the Commission would bring innovation, diversity and localism to radio markets and promote its longstanding media ownership goals.

The under-representation of small businesses in the broadcast industry compounds each time a broadcast transaction is completed without providing opportunities for such entities to bid for broadcast properties, and it is not possible to retroactively correct lost opportunities to increase diversity and competition in this marketplace. Given this time sensitivity, MMTC respectfully requests that the Commission promptly issue a Notice of Proposed Rulemaking to seek comment on MMTC's proposal, rather than separately seeking comment on the Petition before proposing to modify the rule. MMTC's proposal is clear and unambiguous, and parties with views on its viability will be afforded ample opportunity to participate during the rulemaking process.

In addition, while the rulemaking is pending, MMTC respectfully requests that the Commission adopt an interim policy favoring the granting of ownership waivers on a case-by-case basis under the circumstances outlined here.[21] An interim waiver policy, like the rule change proposed by MMTC, would increase opportunities for small business investment and would provide additional options for sellers of broadcast properties. The public interest would be amply served by such an approach.

Respectfully submitted,

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[21] The Commission has previously adopted interim waiver policies to promote important goals while rulemaking proceedings are pending. *See, e.g.*, *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763, 6775 (2005) (adopting an interim waiver policy favoring the extension of low-power FM construction permits to three years in order to increase the likelihood that such stations would complete construction and begin operation); *Review of the Commission's Regulations Governing Television Broadcasting*, 11 FCC Rcd. 21655, 21681 (1996) (adopting an interim policy favoring waivers of the television duopoly rule, conditioned upon the outcome of the ongoing rulemaking proceeding, where the commonly owned television stations were located in separate Designated Market Areas (DMAs) and there was no Grade A overlap between them).