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

In the Matter of:	)	
Petition for Rulemaking of the Minority Media and Telecommunications Council	)	File No. RM-11388
To Facilitate the Entry of Small Businesses Into Local Radio Markets	)	

REPLY COMMENTS OF
THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

In its petition for rulemaking ("Petition"), the Minority Media and Telecommunications Council ("MMTC")[1] proposed that the Commission take certain specified steps to promote diversity in local radio markets. Specifically, the Petition proposes that the Commission allow a grandfathered radio cluster that otherwise exceeds the applicable ownership cap to be transferred in its entirety to any third party as long as, within a 12-month period following consummation of the transaction, the third party transfers the entire cluster or the stations exceeding the cap to a small business. Given the commenters' support for its Petition, MMTC urges the Commission to promptly issue a Notice of Proposed Rulemaking and promptly thereafter to adopt MMTC's proposal.

As Clear Channel observed in its comments, "the FCC's existing policy regarding the transfer of grandfathered radio station combinations has not been effective in

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1 Minority Media and Telecommunications Council, *Petition for Rulemaking To Facilitate the Entry of Small Businesses Into Local Radio Markets*, File No. RM-11388 (filed July 12, 2007) ("Petition").

promoting ownership by small businesses."[2] MMTC's Petition "provides an opportunity to enhance the effectiveness of the FCC's policy regarding the transfer of grandfathered combinations and thereby further the important policy of promoting [small business radio] ownership. . . ."[3]

In its comments, Clear Channel detailed its recent experience in marketing 448 of its station licenses located outside the top 100 radio markets. Despite Clear Channel's efforts to promote small business ownership of these properties, "a number of otherwise qualified small businesses were unable to do deals because they could not arrange financing in a timely fashion."[4] The National Association of Broadcasters ("NAB") agreed in its comments that the FCC's existing policy "has not worked as intended" because of the difficulty of raising capital.[5]

MMTC's proposal would address that problem by allowing small businesses sufficient time to acquire the funds necessary to purchase available media properties. As a result, both Clear Channel and NAB supported the Petition's proposal to enable and facilitate the acquisition of radio stations by small businesses.[6] In reply comments to be filed this date, an unprecedented group of 20 broadcasters, 14 media brokerages, five financial institutions, and seven public interest and civil rights organizations have endorsed MMTC's proposal,

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2 Comments of Clear Channel Communications, Inc., File No. RM-11388, at 2 (filed Sep. 5, 2007) ("Clear Channel Comments").

3 *Id.* at 3.

4 *Id.*

5 Comments of the National Ass'n of Broadcasters, File No. RM-11388, at 3 (filed Sep. 5, 2007) ("NAB Comments").

6 *Id.* at 2.

reaffirming that, for over a generation, all stakeholders in broadcast regulation have spoken with a single enthusiastic voice in favor of "win-win" minority ownership initiatives.[7]

In addition to its general support of the Petition, NAB sought additional information concerning MMTC's proposal that unsold stations should be transferred to a trust at the close of the 12-month period. NAB's questions focus on issues that the Commission will consider on a transaction-specific basis: who will be the trustee, which stations will be placed into the trust, how the trust will be funded, how its profits will be allocated, and when the stations may be sold.[8]

While these questions are important, it is neither necessary nor desirable for the Commission to delay issuing a Notice of Proposed Rulemaking because the questions can only be fully resolved in the context of specific transactions. To the extent that the Commission wishes to consider the issues raised by NAB more generally, the Commission should seek comment on them in a Notice of Proposed Rulemaking.[9] MMTC accordingly provides some suggestions here that others may wish to comment on after the Commission issues such a Notice.

The Commission should allow the initial buyer to sell whichever stations it chooses in order to bring it into compliance with the Commission's radio ownership rules. If it cannot sell sufficient stations to bring it into compliance within 12 months, the initial buyer

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7 *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 983 (1978) (adopting the tax certificate and distress sale policies with broad support from the industry and from civil rights advocates).

8 NAB Comments at 3-4.

9 The National Association of Broadcasters has reviewed these Reply Comments and has authorized MMTC to state that the NAB agrees that the Commission should issue a NPRM endorsing the underlying concept and seeking comment to study the specifics of its implementation.

should file an application to transfer each affected station into a divestiture trust.[10] In each application, the initial buyer will identify the affected station, designate the trustee, and include a proposed trust instrument including, among other provisions, the circumstances under which the trustee must sell the station. The application, reflecting these arrangements, will be subject to Media Bureau approval before it can be implemented.

In conducting its review of the application, the Bureau should be guided by a presumption that transfer of an above-cap station under these circumstances serves the public interest if (1) the trustee is independent of the initial buyer; (2) the trust is irrevocable; and (3) the trust appears likely to facilitate sale of the affected station.

For example, a trust instrument could require the trustee to sell the entrusted radio station to the first legally and financially qualified small business bidder that agrees to pay at least 90% of the station's estimated reasonable market value. The estimated market value of the station, like the rest of the application, would be subject to Bureau review.[11]

Allowing the initial buyer to design the trust at the time it is established − rather than imposing rigid and theoretical restrictions by rule − is necessary for the success of the small business transfer policy. Otherwise, as NAB points out, the new policy, like the existing approach, would remain unused if the industry views it as burdensome or inefficient.[12] To ensure that parties take advantage of the small business transfer policy and

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[10] MMTC recommends that the Commission require such an application to be filed no later than 60 days before the close of the 12-month window in order to allow sufficient time for staff review and grant.

[11] As appropriate, the Media Bureau could request additional information demonstrating the reasonableness of any such market value estimates. These applications, of course, would also be subject to comment by any members of the public who disagree with the trust conditions proposed by applicants.

[12] NAB Comments at 4.

thereby put more radio stations in the hands of small businesses, and to ensure that radio stations remain effective market participants while in trust, the Commission should provide flexibility for owners to make appropriate decisions in designing appropriate trust arrangements to suit the facts of specific transactions.

In addition, the Commission should require trustees to first apply any profits from the operations of a station in trust to station operating expenses and then to the costs of the trust itself. Any surplus profits from station operations thereafter should be held in trust as part of the station's assets, to be transferred to the small business buyer at the time the station is sold out of the trust. Conversely, any costs of operating the station or the trust that remain unpaid after station profits are applied should be borne by the initial buyer until the station is sold to a small business purchaser.[13] This approach will make the station held in trust more attractive to potential small business buyers and will avoid incentives for buyers to gain profits while leaving the station in trust indefinitely.

In its comments, NAB proposes that the Commission could merely require initial buyers to be subject to a good faith requirement in attempting to sell an above-cap station and impose a trust condition only if it finds that the initial buyer failed to use good faith in marketing the station.[14] Both the approach described here and in the Petition and NAB's "good faith" proposal create flexibility for initial buyers to design and implement effective divestitures. However, the NAB's proposed "good faith" policy could (1) delay sale of the over-cap stations, (2) impose substantial and continuing burdens on the Commission's

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13 An initial buyer that wishes to terminate its responsibility to fund the trust at some future time could choose to include in the trust instrument an accelerated sale clause, by which the trustee would be required to auction the stations to the highest qualified small business bidder if, after a specified period of time, they could not be sold at the price specified in the trust instrument.

14 NAB Comments at 4.

staff to investigate and review the buyers' conduct until the affected stations are sold, and (3) create uncertainty because "good faith" is a subjective concept. By contrast, a 12-month divestiture period followed by a trust requirement is (a) clear and straightforward, (b) requires limited Commission oversight, *i.e.*, only at the time the station is put in trust and then when it is sold out of the trust, and (c) because of its certitude, would enjoy the support of the public interest and civil rights communities.[15]

The procedure proposed in the Petition − allowing an entity to hold above-cap stations for up to 12 months prior to transferring them to a small business or to a divestiture trust − is an exception to the Commission's general rule that an entity cannot hold licenses exceeding the applicable multiple ownership limits. It is, therefore, both reasonable and appropriate that the Commission establish a specific time within which the initial buyer must divest itself of stations that exceed the ownership limits and ensure that those stations are transferred to a small business.

According to Clear Channel, "a number of larger radio station operators are electing to sell smaller market properties and/or to privatize. Both of these situations create purchasing opportunities that, within the one-year period, small businesses could effectively capitalize upon." Delayed action on MMTC's petition will result in a lost opportunity to use these transactions to increase media diversity and to promote small business investment in radio. In order to ensure that the radio transactions on the horizon will in fact create real opportunities for small business entrants, the Commission should promptly issue a Notice of

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15 Earlier this week in another context, MMTC and 28 other organizations supported firm waiver deadlines to ensure that, at the end of a waiver period, an affected station must be either sold to a socially and economically disadvantaged business or placed into an irrevocable and independent trust. Initial Comments of Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121, at 40 (Oct. 1, 2007).

Proposed Rulemaking on MMTC's Petition and should expeditiously adopt MMTC's proposal.

Respectfully submitted,

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