IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT,

Petitioners, No. 03-3388, et al.

v.

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,

Respondents.

RESPONSE, AND REQUEST FOR AFFIRMATIVE RELIEF, OF MMTC ET AL. CONCERNING TRIBUNE COMPANY'S MOTION FOR PARTIAL LIFTING OF STAY

Pursuant to Fed. R. App. P. 27(a)(3), MMTC et al. ("MMTC")[1/] respectfully responds to the July 22, 2004 motion of Tribune Company for a partial lifting of this Court's stay of the FCC's cross-ownership rules. Affirmative relief is also respectfully sought pursuant to Fed. R. App. P. Rule 27(a)(3)(B); see p. 6 infra.

As shown herein, Tribune's motion should not be granted as styled, because

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1/ Minority Media and Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press. MMTC is authorized to state that the views presented herein also represent the views of petitioners National Association of Black Owned Broadcasters and Rainbow/PUSH Coalition.

the Court has mandated that deregulatory steps should be taken only upon careful examination of their impact on minority ownership. However, if the Court were disposed to favor the ultimate relief Tribune seeks, the Court should state that it would be amenable to partially lifting the stay if the FCC, on remand, evaluates the specific potential impact on minority ownership that could be presented by large-market crossownership,[2/] and takes reasonable steps to mitigate any substantial adverse impact.

In 1999 (and on many other occasions), the FCC promised to "expand opportunities for minorities and women to enter the broadcast industry." Review of the Commission's Rules Governing Television Broadcasting (R&O), 14 FCC Rcd 12903, 12910 ¶14 (1999) (subsequent history omitted). In the Order reviewed in this case, the FCC acknowledged that minority and female ownership diversity was one of the five types of diversity it sought to advance through its structural regulations.[3/] Thus, when it considered whether the FCC acted reasonably in repealing its Failing Station Solicitation Rule ("FSSR"),[4/] the Court concluded:

[2/] It is not clear whether large-market crossownership is to be distinguished from medium market crossownership at the nine-station level, as recommended by Tribune. Other parties will debate that point in their respective papers. This seems to be a fact question best determined by the Commission on remand.

[3/] 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13627 ¶18 (2003) ("Order"), JA0044.

[4/] 47 C.F.R. §73.3555 n. 7 (which requires a duopoly waiver applicant to provide notice of the sale to potential out-of-market buyers before it can sell a failed, failing, or unbuilt station to an in-market buyer.) The FCC had created the FSSR to ensure that qualified minority broadcasters had a fair chance to learn that duopoly-eligible stations were for sale. See Prometheus Radio Project v. FCC, No. 03-3388 et al. (3d Cir., June 24, 2004) ("Slip Op.") at 94.

> By failing to mention anything about the effect this change would have on potential minority station owners, the Commission has not provided "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston TV Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) . . . . In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission "entirely failed to consider an important aspect of the problem," and this amounts to arbitrary and capricious rulemaking." State Farm, 463 U.S. at 43; see also Copps Dissent, 18 F.C.C.R. at 13,970-71 (chastising the Commission for "fail[ing] to conduct rigorous analysis of today's rules on minorities and women); Adelstein Dissent, 18 F.C.C.R. at 13,997 (same). For correction of this omission, we remand.

Slip Op. at 95-96 (fns. omitted).[5/]

If this holding left any doubt whether the FCC could remove ownership protections without considering the impact on minority ownership, the Court emphasized that

> [r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal's effect on minority ownership is also inconsistent with the Commission's obligation to make the broadcast spectrum available to all people "without discrimination on the basis of race." 47 U.S.C. §151.

Slip Op. at 96 n. 58.

Finally, the Court underscored that consideration of minority ownership in structural regulation is not limited just to avoiding extreme scenarios where no policy at all protects minority ownership. In particular, noting that the FCC had

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[5/] The Court's citations are to Motor Vehicle Mfgrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1982), Order, 18 FCC Rcd at 13970-71 (2003) (Dissenting Statement of Commissioner Michael J. Copps), JA-0386-0387, and id. at 13997 (Dissenting Statement of Commissioner Jonathan S. Adelstein), JA0416.

deferred consideration of fourteen MMTC proposals for new minority ownership policies,[6/] the Court directed that "[t]he Commission's rulemaking process in response to our remand order should address these proposals at the same time." Slip Op., p. 96; see also id. at 124-25 n. 82 (to the same effect).[7/]

It follows that before the relief sought by Tribune could be implemented, someone – the Court or the FCC – should evaluate the extent and nature of such injury to minority ownership as could arise if the crossownership ban were lifted. Such a determination is fact-based, and thus it should be rendered by the FCC on remand. In such remanded proceedings, MMTC would demonstrate that at least fifteen minority owned companies are planning or attempting to distribute fulltime multicultural, Spanish or other non-English language program services through over-the-air, cable or satellite platforms. Further, MMTC would show that in the most cost-effective and accessible platform -- over-the-air television – these multicultural and language-based program services require access to several large television markets. For example, an over-the-air Chinese, Japanese or Korean language television service is feasible if stations are available in New York, Los Angeles, San Francisco, Seattle and Honolulu – markets all impacted by Tribune's

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[6/] Some of these proposals had already been deferred for many years – one of them since 1990. See MMTC Main Brief (filed October 21, 2003) at 7-8.

[7/] On the question of whether the FCC should consider narrowly tailored but race-conscious initiatives such as those aimed at assisting socially and economically disadvantaged businesses ("SDBs"), the Court stated that it anticipated "that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver [of the transferability of pre-existing noncompliant consolidations] will better promote the Commission's diversity objectives." Slip Op. at 110 n. 70.

motion. Finally, MMTC would demonstrate that multicultural and language-based fulltime program services are unlikely ever to be available on stations crossowned with local newspapers, but they are quite likely to be broadcast on minority owned stations.

The record before this Court shows that minority broadcasters labor under a lack of access to capital,[8/] as well as a lack of awareness that potential deals are even available to qualified buyers.[9/] Thus, absent carefully tailored relief, the sudden availability of perhaps dozens of large market television stations to local newspapers could preclude minority ownership of many of these highly desirable properties. Given their financial wherewithal and operating synergies, newspapers would outbid most other potential buyers for same-market television stations.

However, minorities' disadvantages in access to capital and opportunity can be overcome or substantially ameliorated. For example, the FCC could extend the FSSR to stations that might be subject to crossownership. It could also grandfather the nonattribution of "equity/debt plus" (EDP) interests in stations owned by disadvantaged businesses – a powerful incentive to draw capital, and the expertise and partnership of long-established broadcast companies, to minority owned and other disadvantaged ventures.[10/]

MMTC is confident that the FCC has the expertise to evaluate this subject and adopt tailored remedies by the conclusion of this year. If the Court chooses to remand the matter, it should require expeditious consideration of both the crossownership and minority ownership issues.

[8/] See Initial Comments of Diversity and Competition Supporters (MMTC et al.), MB Docket 02-277 (filed January 2, 2003) at 32-33, JA4326-4327.

[9/] See id. at 117-118, JA4401-4402.

[10/] See MMTC Main Brief at 23-25.

In conclusion, if the Court is disinclined to favor Tribune's motion, it should deny the motion and do nothing more. However, if the Court is inclined to favor the ultimate relief Tribune requests, it should remand to the FCC with instructions to expeditiously consider the extent and nature of large market crossownership on minority ownership, and to design and implement such corrective steps as may be necessary. Thereupon the FCC should report to this Court and, in that scenario, unless it were shown that the FCC's corrective steps were plainly unreasonable, the Court could partially lift the stay as urged by Tribune.

Respectfully submitted,

/s/

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David Honig
Minority Media and Telecommunications Council
3636 16th Street N.W. #B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel of Record for Minority Media and Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press

August 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2004, I caused one copy of the foregoing "Response," to be served first-class mail, postage prepaid, upon the following parties:

Michael D. Hays
John R. Feore, Jr.
M. Anne Swanson
Theodore L. Radway
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue N.W.
Suite 800
Washington, DC 20036-6802

Counsel for Media General, Inc., Millcreek Broadcasting, Paxson Communications Corp. and Simmons Media Group

Donald B. Verrilli, Jr.
Ian Heath Gershengorn
Jenner & Block, LLC
601 Thirteenth Street N.W.
Washington, DC 20005

Catherine G. O'Sullivan
Nancy C. Garrison
U.S. Department of Justice
Antitrust Division
Patrick Henry Bldg.
601 D Street N.W. Room 10353
Washington, DC 20530

Counsel for United States of America

Jack N. Goodman
National Association of Broadcasters
1771 N Street N.W.
Washington, DC 20036

Counsel for National Association of Broadcasters

John Rogovin
General Counsel
Federal Communications Commission
Room 8-A741
445 12th Street S.W.
Washington, DC 20554

Counsel for the Federal Communications Commission

Robert A. Long, Jr.
Jennifer A. Johnson
Covington & Burling
1201 Pennsylvania Avenue N.W.
Washington, DC 20004-2401

Counsel for the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the Network Affiliates Stations Alliance

Wade H. Hargrove
Mark J. Prak
Brooks, Pierce, McLendon, Humphrey & Leonard
1600 Wachovia Capitol Center
150 Fayetteville Street Mall
Raleigh, NC 27601

Counsel for the ABC Television Affiliates Association and the Network Affiliated Stations Alliance

Andrew Jay Schwartzman
Media Access Project
Suite 1118
1625 K Street N.W.
Washington, DC 20006

Samuel L. Spear
Spear Wilderman Borish Endy Spear & Runckel
Suite 1400
230 South Broad Street
Philadelphia, PA 19102

Counsel for the Prometheus Radio Project et al.

Jerome M. Marcus
Berger & Montague, P.C.
1622 Locust St.
Philadelphia, PA 1910-03-6305

Dianne Smith
Special Projects Counsel
Capitol Broadcasting Co., Inc.
2619 Western Blvd.
Raleigh, NC 27606

Counsel for Capitol Broadcasting Company, Inc.

Angela J. Campbell
James A. Bachtell
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

Counsel for Media Alliance and Office of Communication of the United Church of Christ, Inc.

Michael K. Kellogg
Mark L. Evans
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Lawrence Tu
Susan Weiner
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10112

F. William LeBeau
National Broadcasting Company, Inc.
1299 Pennsylvania Ave. N.W.
Washington, DC 20004

Counsel for National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.

Shelby D. Green
Pace University School of Law
78 N. Broadway
White Plains, NY 10603

Counsel for the National Council of the Churches of Christ in the United States

Henk Brands
Patrick S. Campbell
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1615 L Street N.W.
Suite 400
Washington, DC 20036

Counsel for Fox Entertainment Group, Inc., Fox Television Stations, Inc., and Viacom, Inc.

Ellen S. Agress
The News Corporation Limited
1211 Avenue of the Americas
New York, NY 10036

Maureen A. O'Connell
The News Corporation Limited
444 N. Capitol Street N.W.
Suite 740
Washington, DC 20001

Counsel for Fox Entertainment Group, Inc., and Fox Television Stations, Inc.

John F. Sturm
President and Chief Executive Officer
Newspaper Association of America
1921 Gallows Road
Suite 600
Vienna, VA 22182-3900

Counsel for the Newspaper Association of America

James Winston
Rubin Winston Diercks Harris & Cooke LLP
1155 Connecticut Ave. NW, 6th fl.
Washington, DC 20006

Counsel for the National Association of Black Owned Broadcasters and the Rainbow/PUSH Coalition

Michael D. Fricklas
Mark C. Morril
Viacom Inc.
1515 Broadway
New York, NY 10036

Counsel for Viacom Inc.

Kathryn R. Schmeltzer
Barry H. Gottfried
Paul A. Cicelski
Scott R. Flick
Brendan Holland
Christopher J. Sadowski
Shaw Pittman LLP
2300 N Street N.W.
Washington, DC 20036

Counsel for Sinclair Broadcast Group, Inc. and Univision Communications, Inc.

David P. Fleming
General Counsel, Gannett Broadcasting
Gannett Co., Inc.
7650 Jones Branch Drive
McLean, VA 22107

Counsel for Gannett Co., Inc.

Guy Kerr
Senior Vice President/Law and Government
& Secretary
Belo Corp.
400 South Record Street
Dallas, TX 75202

Counsel for Belo Corp.

James R. Bayes
Richard J. Bodorff
John E. Fiorini, III
Kathleen A. Kirby
Helgi C. Walker
Eve Klindera Reed
Wiley Rein & Fielding LLP
1776 K Street N.W.
Washington, DC. 20006

Counsel for the Newspaper Association of America, Gannett Co., Inc., Belo Corp., Morris Communications Company, LLC, Emmis Communications Corporation, and Clear Channel Communications, Inc.

Paul C. Besozzi
Stephen Diaz Gavin
Patton Boggs LLP
2550 M Street N.W.
Washington, D.C. 20037

Timothy R. Smith
Nassau Broadcasting Holdings, Inc.
Nassau Broadcasting II, L.L.C.
619 Alexander Road, 3rd fl.
Princeton, NJ 08540

Counsel for Nassau Broadcasting II, L.L.C. and Nassau Broadcasting Holdings, Inc.

Carter Phillips
R. Clark Wadlow
Richard Klinger
Jim Young
Anita Wallgren
Sidley Austin Brown & Wood
1501 K Street N.W.
Washington, DC 20005

Counsel for Tribune Co.

David A. Irwin
Alan C. Campbell
Jason S. Roberts
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave. N.W.
Suite 200
Washington, DC 20036-3101

Counsel for Sunbelt Communications Company, Diversified Communications, Press Communications, LLC, and Family Stations, Inc.

Glenn B. Manishin
Stephanie A. Joyce
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182

Rachel Weintraub
Assistant General Counsel
Consumer Federation of America
1424 16th Street N.W.
Suite 604
Washington, D.C. 20036

Gene Kimmelman
Senior Director of Public Policy and Advocacy
Consumers Union
1666 Connecticut Ave. N.W.
Suite 310
Washington, D.C. 20009-1039

Counsel for Consumer Federation of America and Consumers Union

/s/

_____

David Honig