Financial Issues Subcommittee Recommendation to the
Federal Communications Commission's
Advisory Committee on Diversity for Communications in the Digital Age

December 10, 2004

Adoption of an Declaratory Ruling on Section 310(b)(4) Waivers

Be it resolved that the Advisory Committee on Diversity for Communications in the Digital Age recommends that the Commission adopt the following declaratory ruling:

> In the absence of special national security, law enforcement, trade or foreign policy concerns -- as determined by the procedures established in the *Foreign Participation Orders*, 12 FCC Rcd 23891 (1997) and 12 FCC Rcd 24094 (1997) -- it is the policy of the Commission that in a transaction with a small disadvantaged business ("SDB") for the acquisition of a broadcast license, foreign companies or persons whose principal place of business (or headquarters) is located in a country that is a member of the WTO will be presumed to satisfy the public interest waiver standard of Section 310(b)(4) of the Communications Act, provided that aggregate foreign investment in broadcast media do not exceed 49% of total equity and that such equity interests do not convey more than 25% of voting power in such broadcast media; provided, however, that if the foreign company or person is also from a country that is a member of NAFTA and/or the Caribbean Basin Initiative, it may also hold up to 49% of voting power in the broadcast entity. Notwithstanding the foregoing, no such waiver will be presumed in cases where it is demonstrated that the home country of the foreign investor does not, or will not over the ensuing five years, provide comparable reciprocal treatment to U.S.-based entities or persons." An SDB shall be defined as an entity that is economically and socially disadvantaged (as referenced in the Telecommunications Ownership Diversification Act of 2003, S. 276, 108th Congress) and also meets the small entity size standards appropriate for its particular industry. The size standards would be determined by the Commission, and the certification process to determine SDB eligibility should be administered by the Commission in a streamlined and expedited manner.

Explanation of Proposal

A waiver policy for foreign ownership would have the practical effect of providing access to a great deal of capital for socially and economically disadvantaged entrepreneurs (SDBs). While open to all, a foreign ownership waiver initiative would as a practical matter most significantly benefit members of minority groups. We believe that a policy geared to SDBs, and containing especially attractive incentives for NAFTA and Caribbean Basin Initiative countries, could deliver approximately the impact on access to capital for minority entrepreneurs that a partial restoration of the tax certificate policy would deliver.

Section 310(b) of the Communications Act provides that certain FCC licensed facilities, including broadcasting, shall be granted or held by aliens, their representatives, corporations organized under the laws of foreign governments, corporations having over 20% of their capital stock owned or voted by aliens, foreign governments (etc.) and — in subsection (4):

> any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

Notwithstanding this language in Section 310(b)(4), the FCC must determine the qualifications of a proposed broadcast assignee or transferee before the assignment or transfer can take place. See 47 U.S.C. §309(d)(2). It is unlikely that a foreign investor would volunteer the time, effort and expense to be a Section 310(d)(4) waiver test case without knowing up front that its application were going to be approved. Thus, the Commission should articulate a waiver policy before SDBs begin seeking foreign investments. While such a policy could be established through rulemaking, such a process would be needlessly time-consuming because Section 310(b)(4) is essentially self-executing. Consequently, the most straightforward approach would be for the Commission to issue a Declaratory Ruling, using such public comment procedures as it feels necessary or appropriate.

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