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Small Businesses = Longer CPs + More Investment

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In the March, 2008, *Memo to Clients* we reported on the FCC's Diversity Initiative rulemaking activities involving numerous policy and rule changes, some of which were merely proposed, some of which had been adopted. Several of the new Diversity Initiative changes to the FCC's official rules are now due to become effective next month (July 15, to be specific). The new rules and policies coming on line in mid-July will: (a) permit the 18-month extension of certain construction permits; (b) relax to some degree the limits on financial involvement for multiple ownership/attribution purposes; and (c) impose newly formalized prohibitions on certain commercial activities. (Note: a couple of petitions for reconsideration of the Commission's order have been filed and the Commission has sought responses; however, the effectiveness of the new rules has not been stayed.)

The primary beneficiaries of the Diversity Initiative are "small businesses" (as that term is defined by the Small Business Administration (SBA)). To meet the SBA's definition of "small business", a radio station owner must have revenue of less than \$6.5 million per year, and a television station owner must take in less than \$13 million per year. To avoid abuse of this definition by larger companies creating new subsidiaries that have little or no revenue in order to fall within these limits, the FCC also adopted control tests requiring certain percentages of equity and voting power in the qualified permit-holding entity. (Check out the sidebar to our March, 2008 *Memo to Clients* article for details.)

CP Extensions – First, despite the fact that the FCC has held fast to its "no extensions of construction permits" policy for nearly a decade, under the new rules "small businesses" which acquire expiring CPs for new stations can obtain additional time to finish building. Specifically, a qualifying buyer will be entitled to a minimum of 18 months from the date of closing of the permit to complete construction.

For someone holding a close-to-expiring permit that will soon be worthless upon expiration, this new provision provides tremendous incentive to sell the permit to a small business at any price. The extension is available for any CPs for new TV, AM, FM,

translators, boosters, and other various and sundry types of broadcast facilities. The extensions apparently do *not* apply to construction permits for modification of licenses of already-existing broadcast stations.

Although the precise procedures for obtaining a construction permit extension have not yet been spelled out, it appears that requests for the extension will be part of the normal application process for assignment/transfer of the permit. In the application, the proposed buyer should notify the FCC that it is seeking an extension and must submit evidence to the FCC that it qualifies as an eligible small business under the SBA revenue limits and the control tests. After the sale is completed and an official consummation notice has been filed, the staff will update the FCC's database to reflect the extended expiration date.

Importantly, we understand that no extension will be issued until *after* the deal has been consummated and the permit is held by a "small business" – but no extension can be granted if the permit has already expired. That means that anyone hoping to take advantage of this new provision should be sure to get the necessary assignment/transfer application filed *and granted* with enough time to get the deal closed *before* the permit is set to expire. (Normally, that kind of application takes at least 45-60 days to get granted in simple, uncontested situations.)

New Attribution Levels – The multiple ownership rules limit the amount of financial investment – debt or equity – that certain entities can provide to a licensee. Generally, these limits apply to entities which hold other stations in the same market and entities which provide programming to the licensee. Under the new rules, attribution can be avoided as long as the investing entity's contribution is limited as follows: either (a) combined equity and debt of up to 50% in the small business, or (b) total debt of up to 80% of the asset value of a station being acquired if there is no equity ownership interest. (The current rules limit such debt or equity interests to 33%.) These changes to the attribution rules will also affect eligibility for new-entrant bidding credits in future broadcast spectrum auctions.

Non-discrimination Requirements – As of July 15, discrimination in broadcast station sale transactions will be formally prohibited. The uncharacteristically succinct new rule reads, in its entirety: "No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV, or international broadcast stations (as defined in this part [of the FCC's rules])." It is not clear to what extent (if at all) discrimination by private parties in the sale of broadcast stations has historically occurred, but from July 15 on any such discrimination will be officially against the rules. Eventually, the FCC will require assignment/transfer applicants to certify that they have complied with this new rule. In

the mean time, though, if you are negotiating the sale of your commercial broadcast station, do not discriminate on the basis of any of these categories.

As a final note of caution, the FCC's public notice of these new rules indicated that broadcasters, when renewing their licenses, will have to certify that (a) their advertising contracts do not discriminate on the basis of race or gender and (b) such contracts contain nondiscrimination clauses. According to the Commission, the goal here is eliminate "no urban /no Spanish" provisions that are purported to have been included in advertising contracts in the past. It does not appear, however, that the Commission plans to include this specific prohibition in any rule – rather, the FCC apparently intends simply to insert in the license renewal form a mandatory certification that the licensee has complied with that prohibition. As a precautionary matter, even though the next renewal cycle is still several years away, it would be prudent for all broadcasters to revise all of their advertising agreements to include a statement that the broadcaster does not practice or condone discrimination in the sale of advertising time.