



Federal Communications Commission
Washington, D.C. 20554

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Small Entity Compliance Guide

Diversity in Broadcast Licensing

FCC 07-217

MB Docket Nos. 07-294, 06-121, and 02-277

MM Docket Nos. 01-235, 01-317, 00-244, and 04-228

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions— comply with the FCC rules. This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. While we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be made based on application of the statute and regulations. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may revise this Guide without public notice to clarify or update the contents. Direct your comments and recommendations, or calls for further assistance, to the FCC’s Consumer Center:

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TTY: 1-888-TELL-FCC (1-888-835-5322)

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Compliance Requirements

Sources and Links

The Commission’s Decision: Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rule Making, FCC No. 07-217, 23 FCC Rcd 5922 (rel. Mar. 5, 2008).

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.doc

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.pdf

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-217A1.txt

Rules that the Commission Adopted or Revised

The Report and Order adopts numerous initiatives to foster broadcast ownership by new entrants and small businesses, including minority- and women-owned businesses. The Commission believes that broadening ownership participation to include new entrants and small businesses, including women- and minority-owned businesses, in the broadcast industry will foster viewpoint diversity, promote innovation, and benefit consumers.

Eligible Entities: Only “eligible entities” are intended to receive the benefits of the measures adopted in the Report and Order. An “eligible entity” is defined as any entity that qualifies as a small business consistent with Small Business Administration (“SBA”) standards for its industry grouping, based on its revenue. At present, the SBA defines as a small business a television broadcasting station that has no more than \$13 million in annual receipts and a radio broadcasting entity that has no more than \$6.5 million in annual receipts. To determine qualifications as a small business, the SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. In addition, in order to ensure that ultimate control rests in an eligible entity that satisfies the revenue criteria, the entity must satisfy one of several control tests. The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company. In the Report and Order, the Commission concludes that using the “eligible entity” definition will help promote diversity of ownership in the broadcast industry by making it easier for small businesses and new entrants to compete with larger, better-financed companies.

Revision of Rules Regarding Construction Permit Deadlines: The Report and Order affords eligible entities that acquire expiring construction permits additional time to build out the facility.

Previous Rules: Section 73.3598 of the Commission’s rules requires all permittees for new TV, AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator or

FM booster stations to complete construction of their broadcast facilities and apply for a license within three years of the date of issuance of the construction permit. Construction permits for new LPFM stations allow all permittees 18 months to complete construction and file a license application. Generally any construction permit is automatically forfeited, without any further affirmative cancellation by the Commission, if station construction has not been completed and an application for a license has not been filed by the end of the construction period.

Rule Changes: The Report and Order revises Section 73.3598 of the Commission's rules to allow eligible entities that acquire an expiring construction permit additional time to build out the facility. The eligible entity will have either the time remaining on the original permit or 18 months from the consummation of the assignment or transfer of control of the expiring permit, whichever is greater, to complete construction and file an application for license.

Modification of Attribution Rule: The Report and Order also revises Note 2(i) to Section 73.3555 of the Commission's rules, which sets forth the Commission's equity/debt plus ("EDP") attribution standard to facilitate investment in eligible entities.

Previous Rules: The Commission's broadcast attribution rules define which financial or other interests in, or relationships with, a licensee are counted in applying the broadcast ownership rules. With regard to corporate entities, the broadcast attribution rules generally attribute voting stock interests of five percent or more. Minority stock interests in a corporation with a single-majority shareholder, non-voting stock interests, warrants, debt, properly insulated limited partnership and LLC interests, and unexercised options are not attributable, unless the EDP rule is triggered. The EDP rule is designed to resolve concerns that multiple non-attributable interests could be combined to allow their holders to exert significant influence over licensees such that these interests should be counted in applying the multiple ownership rules. Under the EDP rule, where an investor is either (1) a major program supplier (providing programming constituting over 15 percent of a broadcast station's total weekly broadcast programming hours); or (2) a same-market media entity subject to the broadcast multiple ownership rules, its interest in a licensee or other media entity will be attributed if that interest, aggregating both debt and equity holdings, exceeds 33 percent of the total assets (equity plus debt) of the licensee or media entity. In other words, attribution results where the financial interest exceeds 33 percent *and* there is a triggering relationship, *i.e.*, either the investor is a major program supplier or a same-market media entity subject to the broadcast multiple ownership rules. The EDP rule limits the single majority shareholder attribution exemption, as well as the exemptions from attribution applicable to non-voting stock, debt, and properly insulated interests in limited partnerships and LLCs. The EDP rule applies to all of the broadcast ownership rules.

Rule Changes: The Report and Order modifies the EDP rule in order to promote investment in eligible entities. Specifically, the Commission revises Section 73.3555, Note 2(i) of its rules to allow the holder of an equity or debt interest in a media outlet subject to the media ownership rules to exceed the 33 percent threshold set forth in the rule without triggering attribution where such an investment would enable an eligible entity to acquire a broadcast station provided: (1) the combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the

eligible entity or any related entity. These higher investment limits in eligible entities also apply for purposes of determining eligibility for the new entrant bidding credit in broadcast auctions.

Distress Sale Policy: The Report and Order modifies the Commission’s distress sale policy to allow licensees to assign their licenses to eligible entities under specific circumstances, thereby placing the policy on a sound constitutional and administrative foundation.

Previous Policy: The Commission’s distress sale policy permits a licensee whose license was designated for revocation hearing, or whose renewal application was designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to a “minority controlled entity” at a price substantially below its fair market value. A 1995 Supreme Court decision, *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, cast doubt on the constitutionality of this policy.

Policy Change: The Report and Order modifies the distress sale policy to allow a licensee whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to an “eligible entity.”

Ban on Discrimination in Broadcast Transactions: The Report and Order adopts a new rule that explicitly bars discrimination in broadcast transactions. Section 73.2090 of the Commission’s rules states: 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). Sellers will be required to certify compliance with this rule against discrimination by checking a box on Form 314 or 315 applications. Form 314 is the application form to seek consent to assign a broadcast station construction permit or license, and Form 315 is the application form to seek consent to transfer control of the entity holding a broadcast station construction permit or license.

“Zero-Tolerance” Policy for Ownership Fraud: The Report and Order adopts a “zero tolerance” policy with respect to ownership fraud and reaffirms the principle that applicants’ representations to the Commission must be complete and correct. A commenter in the proceeding noted that ownership fraud occurs when real-parties-in-interest structure transactions so that principals of the putative applicant have no real voice in practice. Ownership fraud could impede the Commission’s efforts to assess or increase media ownership diversity. Because the risk of such fraud arises whenever some applicants can obtain a preference, the Report and Order adopts a “zero tolerance” policy to deter such fraud. The Commission will “fast-track” ownership-fraud claims and seek to resolve them within 90 days. The Commission also will provide confidentiality, when permissible, to whistleblowers who disclose potential ownership fraud.

Non-Discrimination Provisions in Advertising Sales Contracts: The Report and Order adopts a new requirement that broadcasters renewing their licenses certify that their advertising contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses. Reports that some advertising contracts contain “no urban/no Spanish” dictates intended to minimize the proportion of African American or Hispanic

customers patronizing an advertiser's venue – or presume that African Americans or Hispanics cannot be persuaded to buy an advertiser's product or service – indicate potential violations of anti-discrimination laws. However, the Commission does not dictate the specific language of those contracts. The Commission will amend Form 303-S to require broadcasters to make the required certification.

Local and Regional Bank Participation in SBA Guaranteed Loan Programs: The Report and Order adopts a proposal to increase Commission efforts to encourage local and regional banks to participate in SBA-guaranteed loan programs to facilitate broadcast and telecommunications-related transactions. In order to facilitate broadcast and telecommunications-related transactions, the Office of Communications Business Opportunities will work closely with the SBA to educate and encourage more regional and local banks to make loans through the SBA's 7(a) or 504 programs.

Duopoly Priority for Companies that Finance or Incubate an Eligible Entity: Under the local television ownership rule, a company can own two TV stations in a market: (1) if no more than one of the two is among the top four stations in ratings and eight independently owned television stations would remain after the merger ("eight voices test") or (2) if there is no Grade B contour overlap between the two stations sought to be commonly owned. The Report and Order adopts a new policy that, when the local television ownership rule permits only one additional duopoly (combination of two television stations) in a market, an entity financing or incubating an eligible entity will be given priority if it files for a duopoly in that market simultaneously with non-eligible entities that are also seeking a duopoly. This vested priority in a duopolization queue would reward the large broadcaster that had incubated or financed an eligible entity if it filed simultaneously for a duopoly with a non-incubating entity.

Extension of Divestiture Deadlines in Certain Mergers: The Report and Order adopts a policy to consider requests to extend divestiture deadlines in mergers in which applicants have actively solicited bids for divested properties from eligible entities. The Commission has encouraged companies undertaking major transactions to assist small businesses, including those owned by minority and female entrepreneurs interested in purchasing divested properties. But such efforts may take time, and such entities may need additional time to secure funding to complete potential transactions. Consequently, while rigidly enforced divestiture deadlines might be intended to increase minority ownership and viewpoint diversity, they could sometimes have the perverse effect of disadvantaging potential minority owners. Consequently, the Commission will adopt a policy of considering requests to extend divestiture deadlines when applicants have actively solicited bids for divested properties from eligible entities. Entities availing themselves of an extension must either sell a given property to an eligible entity within the extended deadline or have the property placed in an irrevocable trust for sale by an independent trustee to an eligible entity. This would prevent potential abuse of the extensions and ensure that they will actually result in sales to eligible entities.

Sale of Grandfathered Radio Station Combinations to Non-Eligible Entities: In the 2002 Biennial Review Order, the Commission "grandfathered" owners of existing combinations of broadcast stations. That is, the Commission did not require such owners to divest their stations even if their combinations exceeded the new ownership limits adopted in the 2002 order. The

Commission, however, generally prohibited the transfer of such combinations. As an exception to this general rule prohibiting transfers of noncompliant combinations, the Commission permitted the sale of such grandfathered station combinations to “eligible entities,” which definition is the same as in the Report and Order.

The Report and Order adopts a proposal to permit the assignment or transfer of grandfathered radio station combinations intact to any buyer, not just an eligible entity, provided that such a buyer files an application to assign the excess stations to an eligible entity, or to an irrevocable divestiture trust for purposes of ultimate assignment to an eligible entity, within 12 months after consummation of the purchase of the grandfathered cluster. Non-eligible entities seeking to acquire a grandfathered radio station group will be required to file a divestiture trust agreement with their initial application to allow the Commission to evaluate the proposed trust at the outset.

Recordkeeping and Other Compliance Requirements:

Licenses engaged in the sale of a commercially operated AM, FM, TV, Class A TV, or international broadcast station will be required to certify on Form 314 or 315 that they did not discriminate on the basis of race, color, religion, national origin, or sex in the sale of their station. Broadcasters that are renewing their licenses will have to certify on Form 303-S that their advertising sales contracts do not discriminate on the basis of race or gender and that such contracts contain nondiscrimination clauses. The Commission revised its rules to afford eligible entities that acquire an expiring construction permit additional time to build out the facility (either the time remaining on the original construction permit or 18 months, whichever is greater). To obtain this benefit, eligible entities will have to demonstrate that they meet the eligibility criteria. In addition, the Commission relaxed its equity/debt plus attribution standard for interest holders in eligible entities in order to encourage investment in smaller companies. For both these rule changes, there will be revisions to relevant application forms or the instructions to those forms.