

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of)	
)	
William C. De La Pena)	File No. BALCT- 931119KE
)	
For Tax Certificate)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1997

Released: April 3, 1997

By the Commission:

1. The Commission has before it for consideration the application for review of the April 14, 1995 staff action which granted, in part, the request for a tax certificate filed by William C. De La Pena.¹ That action was taken in a letter decision by the Chief, Video Services Division, Mass Media Bureau, in conjunction with the assignment of license of television station WCTD(TV), Channel 35, Miami, Florida from New Miami Latino Broadcasting Corporation ("New Miami") to the Christian Network, Inc. ("Christian Network"). At the time of the assignment, Mr. De La Pena was the sole shareholder of New Miami.

2. Background. In November 1991, as a part of a settlement agreement in a comparative hearing proceeding, Mr. De La Pena, an Hispanic American, purchased a 45% equity interest in New Miami, one of eight competing applicants for a new television construction permit for Channel 35, Miami, Florida. His purchases represented 20% of the company's voting shares, while the remaining 80% of the voting stock was owned by two minority individuals. Pursuant to this same settlement agreement, Mr. De La Pena loaned New Miami the funds necessary to settle with other competing applicants and to construct station WCTD(TV).² As part of the loan agreement, New Miami gave Mr. De La Pena an option to purchase the remaining stock in New

¹ We note that in April of 1995 President Clinton signed H.R. 831, which repealed Section 1071 of the Internal Revenue Code, the provision under which the Commission administered the tax certificate program. Thus, the Commission no longer accepts applications for tax certificate, and it will only consider those tax certificate applications that were filed on or before January 16, 1995. However, all the facts and circumstances of this case occurred prior to April 1995, and are properly before us for review. The application for review is unopposed.

² Through a minor change in ownership, New Miami became the successor to Miami Latino Broadcasting Corporation, a minority-owned company which had been competing since 1984 with other applicants for a permit to construct Channel 35 in Miami. A settlement agreement was entered into between New Miami and each of the competing applicants for the construction permit for Channel 35. Pursuant to the settlement agreement, New Miami agreed to pay to the competing applicants the aggregate sum of \$595,000 in return for the dismissal of their applications.

Miami. In 1992, Mr. De La Pena exercised his option to purchase the remaining stock of New Miami for \$1.6 million minus (1) the purchase price of his initial 45%, (2) his loans to New Miami, and (3) the earnest money paid to New Miami. Subsequently, in 1994, Mr. De La Pena sold the station, as noted above, and requested the issuance of a tax certificate based upon his equity investment, his loans to New Miami and his stated intent to reinvest in another broadcast property.³ Upon consideration of his initial investment in the minority-owned entity, the staff granted Mr. De La Pena's request in part and issued a tax certificate for the value of the initial 45% equity investment. The staff found the tax certificate policy to be inapplicable to any loans advanced to New Miami by Mr. De La Pena or to any additional expenditures of funds by him to purchase the shares of the other shareholders when he obtained 100% control of New Miami. The staff also found Mr. De La Pena's intent to reinvest in other broadcast properties to be inconsistent with the expressed intent of the tax certificate policy, which was to encourage the *sale* of telecommunications properties to minority buyers.

3. In his application for review Mr. De La Pena maintains that the partial tax certificate grant was "unlawful, capricious and an arbitrary departure" from the Commission's minority ownership policies. Mr. De La Pena contends that, in addition to the purchase of the initial New Miami shares, the value of the loans must be a considered factor in the tax certificate award. Mr. De La Pena claims that the loans, like the equity interest, constitute the "start-up" financing contemplated in the Commission's policy statement, Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982), and that the staff's failure to make this finding warrants review of its decision. Even if the Commission denies a tax certificate for the loans, Mr. De La Pena asserts, it cannot lawfully deny him a tax certificate for his total capital investment in New Miami because "the Policy Statement does not distinguish between levels of investment in a minority owned station." Explaining that his initial 45% investment enabled New Miami to "obtain" the permit, Mr. De La Pena characterizes the additional funds with which he purchased the rest of the company's stock as an investment to "stabilize" the company.

4. We have reviewed the action of the staff herein and find the decision to be entirely consistent with precedent and the objectives of our former tax certificate policy. With respect to the contention that the loans should be considered start-up financing, we disagree with Mr. De La Pena's assertions and we affirm the staff's analysis and conclusion. The Commission's minority tax certificate policy was implemented in 1978 to encourage minority ownership of broadcast facilities. At that time, the Commission began to avail tax certificates to entities who proposed transfer of control or assignment of a broadcast license to a minority-owned or controlled entity. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978). A tax certificate "enables the seller of a broadcast station to defer the gain realized upon a sale, either by: (1) treating it as an involuntary conversion, under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, under 26 U.S.C. §1071, or both." Minority Ownership in Broadcasting, 92 FCC 2d at 851. The Commission believed this

³ Mr. De La Pena represents that the loan amount was in excess of \$3.6 million.

policy would foster minority ownership by providing broadcast licensees an incentive to transfer their interests to minority-owned entities. In 1982, the Commission expanded the availability of tax certificates to include initial investors who purchase shares of a minority owned or controlled broadcasting entity, so as to enable minority entities to procure financing and thereby increase minority ownership of broadcast stations. Those initial investors providing start-up financing, which allows for acquisition of the property, and those investors who purchase shares within the first year after the license is issued, which allows for stabilization of the capital base, were eligible for an investor tax certificate. Minority Ownership in Broadcasting, 92 FCC 2d at 857-58. Mr. De La Pena's 45% equity investment in New Miami qualified him as an initial investor providing "start-up" financing, but his loans did not. As stated in the staff's letter, the objective of the former tax certificate policy was to provide an incentive to investors to risk capital in a minority entity acquiring a broadcast facility. Loans, however, are secured transactions rather than the risk equity contemplated by our policy. See Letter to Robert Lewis Thompson, Esq. from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau (April 14, 1995). Mr. De La Pena's argument that his initial stock investment in New Miami was conditioned upon his simultaneous loan does not negate the fact that the loan was a secured transaction, thus outside of our tax certificate policy.

5. Contrary to the contention in the application for review, we find the situation and circumstances here to be different from those in Martin J. Gaynes, 5 FCC Rcd 6781 (1990), where a tax certificate was granted to certain minority investors in a minority-controlled entity. Like the investors in that case, Mr. De La Pena was granted a tax certificate for his initial investment; however, no loan was involved in Martin J. Gaynes. In addition, we explained that our tax certificate policy was meant to "encourage initial investments by minorities, as well as by others, in entities that are being formed to acquire broadcast media interests." Clearly the loans provided here were not an "initial investment," but instead the creation of a debtor-creditor relationship with an existing entity in which Mr. De La Pena had an interest. Again, this is not the start-up capital anticipated by our policy. A secured transaction is founded upon a property interest which provides assurance of payment, while the uncertainty of risk capital provides no such assurance. Our interpretation here is consistent with prior tax certificate policy because, as explained above, our policy was meant to encourage investment.

6. Further, we find unavailing De La Pena's argument that the loans should qualify as start-up financing because the "Policy Statement does not limit the term 'financing' to . . . only the investor's paid in 'capital.'" We believe it is apparent from the language of our policy statement that loans were not intended to be included within the scope of "start-up financing." For instance, we stated that:

. . . tax certificates will be available upon the actual *divestiture of shares by investors* who initially purchase shares in the broadcasting entity or purchase shares within one year after the issuance of broadcast license, and who show that their *capitalization* either enabled a minority owned or controlled entity to acquire a broadcast property or provided necessary start-up financing. Minority Ownership in Broadcasting, 92 FCC 2d at 858. (emphasis added)

7. We find the original disposition of the tax certificate in this case to be compelled by the Commission's former tax certificate policy. With regard to start-up capital, control was the determining factor in our policy. Mr. De La Pena's exercise of his option allowed him to gain control of New Miami. In Letter to Daniel F. Van Horn, Esq. from Roy J. Stewart, Chief Mass Media Bureau, (April 3, 1992), the Mass Media Bureau stated that the investor tax certificate was not designed to encourage a minority entrepreneur to invest in its own business, for it is assumed that a minority entrepreneur, just as a non-minority owner, needs no incentive to invest in its own business. We affirm that staff decision as an accurate interpretation of our former tax certificate policy. Accordingly, Mr. De La Pena's exercise of his option to purchase the remaining stock and assume control of New Miami, was an investment in his own business. Extension of the policy as suggested in the application for review would amount to over-protection of minority entrepreneurs against the realities of the marketplace which all licensees must face. Indeed, if we adopt the analysis set forth in the application for review, the logical extension of the policy would be that a single minority owner with 100% control of a licensee would be entitled to a tax certificate for providing the initial capitalization of his own business. Such a result is not consistent with the goals of the Commission's former tax certificate policy. Mr. De La Pena's exercise of his option allowed him to gain control of New Miami, the subject broadcast entity. In Daniel F. Van Horn, a minority with a controlling stock interest in a licensee benefitted from the Commission's tax certificate policy, since the policy enabled him to obtain the funds that were needed to acquire the station from start-up capital investors. However, the Bureau did not credit that controlling principal's initial and subsequent investments in his own station as constituting start-up capital under the Commission's tax certificate policy. There, as here, the key to our decision was the controlling interest held in the licensee by the individual minority.

8. In view of the foregoing, we find that the staff's disposition of the request for a tax certificate filed by William C. De La Pena was correct and that no basis exists to warrant reversal. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 1.115(g) of the Commission's Rules, the application for review **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary