RECOMMENDATION ON MERGER REVIEW

TRANSACTIONAL TRANSPARENCY AND OUTREACH SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE

RECOMMENDATION

The Transactional Transparency and Outreach Subcommittee recommends that the Advisory Committee commend to the Commission the following recommendation:

> In order to ensure that a transaction is in the public interest, and that it would promote diversity of ownership, divestiture remedies should be fashioned to promote practical opportunities for small businesses, women and minorities to own and operate media and telecommunications services.

SYNOPSIS

The Subcommittee proposes that the Advisory Committee recommend adoption of this policy statement by the Commission to establish clearly and succinctly the objective of the Commission, where practicable, to undertake to promote diversity of ownership of media and telecommunications facilities when administering divestitures of properties associated with transactions subject to the Commission's jurisdiction. It is not the intention of the Subcommittee that the proposal would alter the circumstances under which divestitures are or will be a part of transactions submitted for Commission approval.

BACKGROUND

- Mergers, consolidation and other factors have created significant barriers for minorities, women and small business owners to own and operate telecommunications carriers.
    - As found in the December 2000 FCC-commissioned study entitled "Historical Study Of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present":
        - "Small firms face barriers erected by deregulation and consolidation in both wireless and broadcast."

    - "Minorities and women confront those same barriers; and yet those obstacles stand high atop a persistent legacy of discrimination in the capital markets, industry, advertising, and community--and prior FCC policies, which worsened the effects of discrimination."

  - Former Chairman Kennard also observed that "[s]mall telecommunications businesses generally, and those owned by women and minorities in particular, report that the market consolidation permitted by the relaxation of the FCC's ownership rules has created nearly insurmountable obstacles to those seeking to enter, or even survive as a small player." *See* http://ftp.fcc.gov/Bureaus/Enforcement/News_Releases/2000/nren0034.html.

- The FCC is bound by statute and otherwise directed by Congress not only to ensure that barriers to market entry in the wireless mobile telecommunications segment are removed for minorities, women and small businesses but also to take steps to encourage that these groups own and operate wireless mobile telecommunications businesses.

  - Section 257 of the Communications Act of 1934 (added as part of the Telecommunications Act of 1996) mandates that the FCC identify and eliminate market entry barriers for small telecommunications businesses.

  - Section 309(j) of the Communications Act of 1934 reflects the directive of Congress that the FCC further opportunities in the auction of licenses to provide spectrum-based services for small businesses and businesses owned by women and minorities.

  - The FCC has said that it is committed "to implement the spirit and mandate of Section 257 to promote policies 'favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." *See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, Report (http://www.fcc.gov/Bureaus/OCBO/fcc00279.html).

- Before the FCC can approve the transfer of control of authorizations and licenses connected with the proposed mergers under Sections 214(a) and 310(d)

of the Communications Act, it must weigh the potential public interest harms of the merger against the potential public interest benefits to ensure that, on balance, the proposed transfer of licenses and authorizations would serve the public interest, convenience and necessity (i.e., the Public Interest Test). Where necessary, the Commission can attach conditions to a transfer of licenses and authorizations in order to ensure that the public interest is served by the transaction.[1]

- This evaluation necessarily encompasses the "broad aims of the Communications Act,"[2] which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a *diversity of voices* is made available to the public, and accelerating private sector deployment of advanced services.[3]

- Specifically, under the Public Interest Test, the FCC considers whether the transaction is consistent with the Commission's policies to advance diversity. It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972).

- In addition, the Public Interest Test requires, at a minimum, that the transaction not interfere with the objectives of the Communications Act. The Communications Act—particularly with its Telecom Act amendments—contains specific, direct mandates and instructions, many of which, when implemented by the FCC, embody proactive, *ex-ante* requirements.

    - For example, section 309(j) of the Communications Act states that, when designing a system of competitive bidding for Commission licenses: "[T]he Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and the following objectives: …promoting economic opportunity and competition . . . by avoiding

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[1] *See* 47 C.F.R. § 1.110; *see also WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20001-02 ¶ 30.

[2] *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575.

[3] *See Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821; *cf.* 47 U.S.C. §§ 521(4), 532(a).

excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women . . . ."

- In addition, Congress stated that "[i]n prescribing regulations pursuant to [the above sections], the Commission shall . . . prescribe . . . bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunities for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services."

- Furthermore, as noted, section 257 of the Communications Act obligates the FCC to identify and eliminate market entry barriers for entrepreneurs and other small businesses in the ownership of telecommunications services.

Consequently, as a means of fostering access to opportunity in the transactional arena, where divestiture remedies are required or voluntarily available, the Commission should encourage the structuring of those remedies to ensure that small businesses, women and members of minority groups have substantial opportunities to own and operate media and telecommunications services.