

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

In the Matter of)
)
)
Rules and Policies to Promote New Entry and) MB Docket No. 17-289
Ownership Diversity in the Broadcasting Services)
)

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Association of Broadcasters (NAB)¹ hereby opposes the petition for reconsideration of Red Brennan Group (Red Brennan) in the above-referenced proceeding (the “Petition” or “Red Brennan Petition”).² Red Brennan objects to the Commission’s establishment of an incubator program³ to promote new entry and diversity in radio broadcasting and calls for the Commission to “abandon” the program. The Petition offers no evidence or arguments that would support eliminating the program. Every contention raised by Red Brennan already has been carefully considered and appropriately rejected by the Commission. Accordingly, the Petition should be dismissed or denied.

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² Petition for Reconsideration of Red Brennan Group, MB Docket No. 17-289 (Sept. 27, 2018).

³ *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, MB Docket No. 17-289, FCC No. 18-114 (rel. Aug. 3, 2018) (Incubator Order).

I. THE COMMISSION CORRECTLY DETERMINED THAT THE INCUBATOR PROGRAM WILL PROMOTE, NOT ERODE, COMPETITION AND DIVERSITY IN LOCAL MARKETS

For many years, parties, including diversity groups, have called for the FCC to create an incubator program to foster diversity and new entry among broadcast owners.⁴ In 2016, the Commission explicitly rejected the idea of adopting an incubator program,⁵ and NAB sought reconsideration of that decision.⁶ In 2017, the Commission granted NAB's reconsideration request, adopting an incubator program and a further notice seeking comment on how best to structure the program.⁷

In response to the notice, NAB submitted comments, reply comments, and other filings with specific suggestions for the establishment of the program, including proposals for eligibility criteria, obligations of the incubating and incubated entities, and ways to incentivize participation by established broadcasters.⁸ Several other parties also provided constructive comments supporting adoption of an incubator program.⁹

⁴ See, e.g., Letter from David Honig, President, Multicultural Media, Telecom and Internet Council and Jane E. Mago, Executive Vice President and General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, FCC, Secretary, MB Docket No. 09-182 (Jan. 30, 2013).

⁵ *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, ¶¶ 319-321 (2016).

⁶ Petition for Reconsideration of the National Association of Broadcasters, *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 et al. (Dec. 1, 2016).

⁷ *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9857-9864 ¶¶ 121-145 (2017).

⁸ NAB Comments in MB Docket Nos. 17-289 et al. (March 9, 2018); NAB Reply Comments in MB Docket Nos. 17-289 et al. (April 9, 2018); Letter to Marlene H. Dortch, FCC Secretary, from Rick Kaplan of NAB, MB Docket Nos. 17-289 et al. (April 25, 2018); Letter from Rick Kaplan, NAB, to Marlene H. Dortch, Esq., MB Docket Nos. 17-289, et al. (Mar. 26, 2018).

⁹ See, e.g., Comments of Skip Finley, MB Docket Nos. 07-294, 17-289 (Mar. 9, 2018)(supporting adoption of an incubator program with waiver incentive); Letter to Marlene H. Dortch, Secretary, FCC from DuJuan McCoy, President and CEO, Bayou City Broadcasting,

In contrast, certain organizations that claim to support diversity refused to engage constructively in the proceeding.¹⁰ Instead of responding to the Commission’s call for specific input on designing a workable incubator program, these groups merely reiterated unproven – and in fact inaccurate – assertions that only more stringent ownership limits will promote diversity.¹¹ Like these commenters, Red Brennan is clinging to outdated ownership rules that have utterly failed to expand broadcast ownership opportunities for minorities or

LLC (May 22, 2018)(supporting adoption of an incubator program with waiver incentive); Letter from Francisco Montero, Fletcher Heald & Hildreth, PLC, to Marlene H. Dortch, Esq., MB Docket Nos. 17-289, et al. (May 15, 2018) (discussing limited financing available to small businesses, particularly those owned by minorities and women and endorsing adoption of an incubator program to “provide a means for smaller entities to obtain the financing they need to get off the ground”); Comments of the Federal Communications Commission’s Advisory Committee on Diversity and Digital Empowerment (ACDDE): A Proposal For An Incubator Program, MB Docket No. 17-289 (April 1, 2018) (ACDDE Comments) (supporting adoption of an incubator program with tax credit incentive and proposing that qualifying incubation activities include joint ventures between established broadcasters and incubated entities, or station donations to certain qualifying entities).

¹⁰ Letter from Dana J. Floberg and Jessica Gonzalez, Free Press, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 17-289, et al. (Mar. 9, 2018) (Free Press Letter); Comments of Office of Communication, Inc. of the United Church of Christ (UCC), et al., MB Docket Nos. 17-289 et al. (Mar. 9, 2018) (UCC Comments).

¹¹ In 1978, minorities “control[led] fewer than *one percent*” of the commercial radio and TV stations in the U.S., despite the fact that the FCC at that time set the national TV cap at seven stations; prohibited the ownership of more than one TV station in local markets; banned the local cross-ownership of a newspaper and even a single broadcast station; and imposed strict national and local limits on radio station ownership and on the local cross-ownership of radio and TV stations. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) (emphasis in original). Ethnic and racial minority ownership is noticeably higher today, even though the FCC’s ownership rules are less stringent. In late 2015, ethnic and racial minorities owned 7.1% of all full-power commercial TV stations, 10.8% of commercial AM stations, 6.5% of commercial FM stations, and 15.2% and 15.8%, respectively, of all Class A TV and LPTV stations. *Third Report on Ownership of Commercial Broadcast Stations: FCC Form 323 Ownership Data as of Oct. 1, 2015*, at 6-7, 9-11, 12-15 (Med. Bur. May 2017).

women and calling for the abandonment of a program that has been carefully structured to promote such opportunities. Red Brennan’s request should be denied.

The Commission has already considered and properly rejected Red Brennan’s claim that the incubator program will harm competition and diversity. Specifically, Red Brennan contends that it is “difficult to comprehend” how a program involving waivers of the broadcast ownership rules can promote competition, and alleges that the broadcast ownership limits are “the only proven method of promoting competition and diversity in the broadcast industry.”¹² As Red Brennan might have known had it participated in the proceeding or even quickly skimmed the Incubator Order, the same arguments were made by other parties during the comment cycle.¹³ The Commission carefully considered—and appropriately rejected—these contentions. It found that good cause exists to grant both waivers to incentivize participation and temporary waivers of the broadcast ownership rules to allow incubating entities to hold an otherwise impermissible attributable interest.¹⁴ The Commission concluded that granting such waivers “yields benefits to competition and ownership diversity in a local market that outweigh the impact on local competition in the market in which a waiver is granted.”¹⁵ As the Commission observed, because the incubator

¹² Red Brennan Petition at 1-2.

¹³ Free Press Letter at 2-3 (relitigating its view that any broadcast ownership combinations—apparently even those involving a waiver of the rules to allow ownership by an incubated entity—will harm minority and female ownership); UCC Comments at 2-9 (questioning the Commission’s decision to create an incubator program and repeating earlier complaints about the Commission’s move to relax certain ownership limits). *Id.* at 3-4 (stating that answering questions about how to design an incubator program is “pointless”).

¹⁴ Incubator Order at ¶ 73.

¹⁵ *Id.*

program ties incentive waivers “directly to station ownership by a new or previously struggling entity, any consolidation resulting from the use of a reward waiver will be limited and accompanied by the establishment of a new, or stronger, broadcaster in the same or a comparable market.”¹⁶ Given the public interest benefits that would result from a successful incubator relationship, the Commission held that the public interest would not be served by strict application of the Local Radio Ownership rule.¹⁷

The Commission relied on strong record evidence in adopting waivers as the incentive for established broadcasters to participate, observing that both supporters and opponents of an incubator program believed that strong incentives are necessary to attract established broadcasters to serve as incubating entities.¹⁸ The Commission explicitly acknowledged the concerns of some commenters that ownership waivers would disserve the public interest, stating:

While some commenters assert that granting waivers of local ownership rules to incubating entities could harm rather than promote ownership diversity, we find that the record demonstrates a waiver of the Local Radio Ownership Rule is the benefit within our authority that will best provide a sufficient incentive for established broadcasters to participate in our incubator program.¹⁹

The Commission concluded that its restrictions on the use of incentive waivers would balance its goal of preserving its radio ownership limits with the need to promote

¹⁶ Incubator Order at ¶ 73.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 59 (citing several commenters including ACDDE Comments at 2-4; NAB Comments at 11-12; and UCC Comments at 8 (“[E]ven the best designed incubator program will not be effective without any incentive for in-market licensees to participate.”)).

¹⁹ Incubator Order at ¶ 61.

participation in the program by incubating entities.²⁰ Red Brennan’s unsupported claim that the incubator program will lead to harmful consolidation certainly does not justify revisiting the use of incentive waivers as part of the incubator program, much less “abandonment” of the entire program.

Relatedly, Red Brennan claims that increased media consolidation will lead to higher prices for advertising and make it difficult for new entrants to compete.²¹ But the Red Brennan Petition does not demonstrate that the incubator program will lead to “increased media consolidation” or that common ownership increases advertising rates. It merely identifies two station group owners and states that one programmed its stations to appeal to female listeners of differing ages, while the other owner allegedly programmed its stations to appeal to male listeners by airing “sports and rock music.”²² It provides no information about whether advertising rates changed or that that smaller/newer broadcasters were unable to compete with either station group.

Red Brennan contends that the incubator program also cannot benefit competition because large broadcasters that are at or near the ownership limits will be the only parties to benefit from the program.²³ Red Brennan fundamentally misunderstands how the incubator program works. An established broadcaster who opts to serve as an incubating entity cannot “provide some vague notion of ‘operational support’” and then “walk away . . .

²⁰ Incubator Order at ¶¶ 61, 66-70 (incentive waivers must be used in the same market or a comparable market; an incubating entity qualifying for more than one waiver cannot use more than one waiver in the same market).

²¹ Red Brennan Petition at 4.

²² *Id.*

²³ *Id.*

with a multiple ownership rule waiver in hand.”²⁴ To the contrary, the incubator program sets a very high bar for incubating broadcasters to receive waivers. An incubating must identify a qualified incubated entity, enter into an incubation agreement, and obtain Commission approval for the incubation relationship. It must invest financial and other resources to provide the requisite financial and operational support over a significant period of time. Even after this substantial effort, the incubating entity only receives the benefit of a reward waiver when the incubated entity succeeds in independently owning a station it did not previously own or substantially improves the financial position of a failing station.²⁵ The entire program is structured to ensure that the incubated entity benefits from the expertise and financial support of the more seasoned broadcast owner, with the waiver incentive available only where an incubation relationship leads to a tangible public interest benefit: the incubated entity’s acquisition of a station or resuscitation of a failing station.

II. THE COMMISSION RELIED ON STRONG RECORD EVIDENCE IN DEVELOPING THE ELIGIBILITY STANDARD FOR THE INCUBATOR PROGRAM

Red Brennan also contends that the Commission failed to adequately explain how its eligibility standard for incubated entities will promote diversity.²⁶ To the contrary, the FCC

²⁴ Red Brennan Petition at 4.

²⁵ Incubator Order at ¶ 72 (“To receive a reward waiver, the incubating entity must demonstrate that it has completed a successful qualifying incubation relationship. Specifically, the incubating entity must certify (i) that it complied in good faith with its incubation agreement, as submitted to and approved by the Bureau, and the requirements of our incubator program discussed herein; and (ii) either that the incubated entity holds a controlling interest in the incubated station or a newly acquired full-service AM or FM station, or if the incubated station was a struggling station, that the incubation relationship has resolved the financial and/or operational difficulties that the owner of the previously struggling station faced prior to incubation and sought to remedy through the incubation relationship.”)

²⁶ Red Brennan Petition at 3.

explicitly relied on data submitted by NAB, a separate analysis conducted by the ACDDE and its own analysis in developing the eligibility standard for the incubator program.²⁷ These analyses demonstrated that the Commission’s new entrant bidding credit for broadcast auctions successfully increased participation of women and minorities in the overall bidding pool and among winning bidders.²⁸ The Commission combined a modified version of the new entrant standard (i.e., no more than three radio outlets) with a revenue cap (i.e., the Small Business Administration’s definition of a small radio business) in crafting its standard for incubated entities.²⁹ To further guard against misuse of the program, a prospective incubated entity must also certify that it has met this standard for the three years prior to entering an incubation relationship,³⁰ and that it does not have other sources of funds that would enable it to purchase a station.³¹ Red Brennan does not cite any of the evidence relied upon by the Commission in developing its standard, nor does it explain why that evidence is problematic. It merely complains that the standard is “revenue-based” like the Commission’s eligible entity standard, which is inaccurate.³²

III. CONCLUSION

The FCC should dismiss the Petition. Red Brennan offers no evidence or arguments that warrant the Commission’s reconsideration of the careful balance it struck between the

²⁷ Incubator Order at ¶¶ 20-24.

²⁸ *Id.*

²⁹ *Id.* at ¶¶ 19, 20-27.

³⁰ *Id.* at ¶ 32.

³¹ *Id.* at ¶ 33.

³² Red Brennan Petition at 3.

need for flexibility to attract incubating and incubated broadcasters and the structure needed to foster public trust in the program.

Respectfully submitted,

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Certificate of Service

I, Erin L. Dozier, HEREBY CERTIFY that on this 8th day of February, 2019, a true and correct copy of the foregoing Opposition to Petition for Reconsideration in the matter of Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services (MB Docket No. 17-289), was submitted electronically to the Federal Communications Commission and served via First Class mail upon the following:

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